

WEAVING, SAWING AND HOUSES:  
A TRANS-SYSTEMIC ABORIGINAL RIGHTS FRAMEWORK

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## **ABSTRACT**

Chief Justice Lamer has stated that the doctrine of Aboriginal rights exists and is recognized by section 35(1) of the Canadian constitution because of the “one simple fact” that Aboriginal peoples were already here, living in what became Canada when Europeans arrived. As a result, the purpose of Aboriginal rights is to reconcile the pre-existence of Aboriginal peoples with the Crown. Yet both the conception of reconciliation and the test Lamer C.J. developed to fulfil the purpose underlying s. 35(1) are fraught with numerous problems and contradictions. This thesis adapts the relational approach in anthropology to create a trans-systemic legal framework for Aboriginal rights that allows a more equitable reconciliation than that advanced by Lamer C.J. and avoids the pitfalls of the courts’ current approach.

I begin by exploring how the Court’s conceptions of society and culture, in particular, are the source of the problems in their approach to Aboriginal rights. Focusing in on the Court’s use of “culture,” I then discuss the intellectual foundations of the notion and go through the three phases of the test for Aboriginal rights showing how those foundations have influenced it and the dilemmas and barriers “culture” creates for both the courts and Aboriginal claimants.

One of my major, continuing criticisms of the Court’s approach is that by focusing on culture, the lives and perspectives of Aboriginal claimants and their ancestors are marginalized, and so my proposed trans-systemic framework is based on “re-enlivening” Aboriginal rights. By focusing on life, rather than culture, I argue that this more ably meets the goals and purposes of s. 35(1). This refocusing also results in a different relationship between Aboriginal peoples, the Court and the Crown, and I conclude this thesis with a discussion of how the convergence of Aboriginal legal systems and the common law in Canada may occur.

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To the memory of Dr. Bob Williamson  
The reason I became an anthropologist

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“My son, Chief Gwaxsán, you have made us all proud today. Gədəmǵaldə' and the other chiefs of Git'anmá·ks are very happy that there is a chief amongst the Gitksan who has assumed the full responsibilities of his uncle's rights and position. You have set an example that should be done by all the Gitksan chiefs and until we do so and show to the whole world our inheritance and rights which have been handed down to us from past ages, many people think we Gitk'san [*sic*] people have no history and that we have no rights, but such is not the case. T'əmlax'am, that most sacred place belonging to the Gitksan people, is lost to us and so will happen [to] all of our possessions unless we do the same as Chief Gwaxsán has done. There are many young chiefs who have assumed important and high chief's names, but they have let them lay dormant and do not assert their rights, as you have done. So we have much to thank you for, in waking us to our responsibilities. We stand to profit by your example. What the other chiefs say regarding the prestige of your House during the time of your uncles is correct and I knew him personally and the fame he had on the Skeena River. Nobody can say you have done anything wrong for assuming what is yours and showing to the world your inheritance. You can now take your place in the councils of your fellow chiefs, where you belong.”<sup>1</sup>

The formal telling of the oral histories in the Feast, together with the display of crests and the performance of the songs, witnessed and confirmed by the Chiefs of other Houses, constitute not only the official history of the House, but also the evidence of its title to its territory and the legitimacy of its authority over it....

The witnessing and validation of the House's historical identity, territorial ownership, and spirit power is integral to the Feast. But also integral is the House's demonstration of its prosperity through a distribution of its wealth. A House's wealth is directly linked to its territory.<sup>2</sup>

Here, a complex system of ownership and jurisdiction has evolved, where the chiefs continually validate their rights and responsibilities to their people, their lands, and the resources contained within them. The Gitksan and Wet'suwet'en express their ownership and jurisdiction in many ways, *but the most formal forum is the feast, which is sometimes referred to as a potlatch*. Here Gitksan and Wet'suwet'en government occurs.<sup>3</sup>

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<sup>1</sup> William Beynon, *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks*, ed by Margaret Anderson & Marjorie Halpin (Vancouver: UBC Press, 2000) at 190-91 [alteration in original]. This is the response speech by Chief Lutk'udziús (Tom Campbell) during a feast held for a pole raising that was part of a series of feasts held in 1945. Erecting a pole is an important component in succession and social reproduction as the pole represents and validates the history and territorial rights of a House. See e.g. Neil J Sterritt et al, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998) at 12.

<sup>2</sup> Gisday Wa & Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987* (Gabriola, BC: Reflections, 1989) at 26.

<sup>3</sup> NJ Sterritt, “Unflinching Resistance to an Implacable Invader” in Boyce Richardson, ed, *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) 267 at 277 [emphasis added].

The Northwest Coast potlatch complex is a total social phenomena.<sup>4</sup> It is a process of discussion, consultation and negotiation, that culminates in the gathering of invited people to witness the public performance of the host's, or hosts', mythic narratives, songs, dances, and whatever other prerogatives and property (both material and immaterial) they may own or are making a claim to. It is an institution that has captured the ethnographic and popular imagination of many an outside observer<sup>5</sup> and there have been many attempts to explain its purpose and goal.<sup>6</sup> Like others who have analogized the potlatch complex as, for example, a redistributive mechanism,<sup>7</sup> as a banking or loan system,<sup>8</sup> or as a metaphorical substitute for warfare,<sup>9</sup> some outside scholars have suggested that the potlatch complex is cognizable to the common law legal tradition.<sup>10</sup>

While none of these framings are totally incorrect, such conceptions circumscribe the “totality” of the potlatch complex.<sup>11</sup> Perhaps part of the problem is a product of referring to these

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<sup>4</sup> For a more in depth discussion of the follow (including why I have chosen to refer to these gatherings as the “potlatch complex”) see Mark Ebert, “Feasting Judicial Convergence: Reconciling Legal Perspectives through the Potlatch Complex” (2013) 18 Appeal 21 [Ebert, “Feasting”].

<sup>5</sup> See Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 31; Michael Harkin, “Potlatch in Anthropology” in Neil J Smelser & Paul B Baltes, eds, *International Encyclopedia of the Social & Behavioral Sciences* (New York: Elsevier, 2001) 11885 at 11885.

<sup>6</sup> Regarding earlier attempts at explaining the potlatch complex, John Adams writes, “Explanations of the potlatch have all had as their objective the construction of an adequate rationale for what has appeared on the face of it to be a highly irrational institution.” *The Gitksan Potlatch: Population Flux, Resource Ownership and Reciprocity* (Toronto: Holt, Rinehart & Winston of Canada, 1973) at 85, quoted in Margaret Anderson & Marjorie Halpin, “Introduction” in Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000) 3 at 32.

<sup>7</sup> See e.g. Stuart Piddocke, “The Potlatch System of the Southern Kwakiutl: A New Perspective” (1965) 21:3 Southwest Journal of Anthropology 244.

<sup>8</sup> See e.g. Franz Boas, *The Social Organization and the Secret Societies of the Kwakiutl Indians*, Report of the US National Museum for 1895 (Washington: Government Printing Office, 1897) at 341-42; Kenneth D Tollefson, *The Cultural Foundation of Political Revitalization Among the Tlingit* (PhD Thesis, University of Washington, 1976) [unpublished] at 65, 73.

<sup>9</sup> See e.g. Helen Codere, *Fighting with Property: A Study of Kwakiutl Potlatching and Warfare, 1792-1930*, Monographs of the American Ethnological Society 18 (New York: JJ Augustin, 1950).

<sup>10</sup> See e.g. *Lax Kw'alaams Indian Band v Canada (AG)*, [2008] 3 CNLR 158 at para 32; & Margaret Seguin Anderson, *The Allied Tribes Tsimshian of North Coastal British Columbia: Social Organization, Economy and Trade* (Expert witness report submitted for *Lax Kw'alaams*, 2006) at 2-3, 69.

<sup>11</sup> See too Abraham Rosman & Paula G Rubel, *Feasting with Mine Enemy: Rank and Exchange among Northwest Coast Societies* (New York: Columbia University Press, 1971) at 1; Daly, *supra* note 5 at 31. Moreover, I would propose that suggestions that the potlatch complex is like the courts of the common law reproduces or replicates the “cognizable” approach the Court adopts towards the Aboriginal perspective. While aspects of law were part of and



gatherings by the more generally/popularly known term “potlatch.” “Potlatch” is “an invented omnibus word” that has its origins in the Nuu-chah-nulth word “*patshat*” which has been glossed as “gift” or “giving.” The term entered the English lexicon via Chinook trade jargon around the 1860s.<sup>12</sup> But the term “potlatch” seems to be rarely used by Indigenous speakers. Partly, this could be due to the outlawing of the potlatch by the Canadian government in 1885, and how the law was circumvented by referring to the same gatherings as “feasts.”<sup>13</sup> Contributing to the law was that outsiders often associated the word “potlatch” with one-upmanship and competitive giving of increasing amounts of goods and value, the destruction of property, and the material impoverishment of those involved.<sup>14</sup>

Despite the importance of gifting in the potlatch complex, the gatherings encompassed by the institution involve much more than just exchange. Instead, each type of gathering tends to have a specific name that varies among each peoples, and language, of the Northwest Coast. For example, among the Gitksan these events range from pole- or gravestone-raising feasts, to weddings, divorces, and other events marking changes in social status.<sup>15</sup> Yet because this thesis is framed, generally, within and directed at the contexts of the Aboriginal rights of Aboriginal peoples in constitutional law, I will adopt the more general term “potlatch complex” here to

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performed via the potlatching system, that is only part of the potlatch complex nexus. “Gitksan law,” for example, and its performance in the feast hall *is not* the same as the common law and its performance.

<sup>12</sup> Douglas Cole & Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990) at 6; Christopher F Roth, *Becoming Tsimshian: The Social Life of Names* (Seattle: University of Washington Press, 2008) at 112-13.

<sup>13</sup> Cole & Chaikin, *supra* note 12 at 6, 58; Roth, *supra* note 12 at 112-13. For examples of the semantics of the potlatch, by both First Nations and non-First Nations, during the period around the enacting of the Potlatch law, see Cole & Chaikin, *supra* note 12 at 25-39, and, in particular, their recounting of the *R v He-ma-sak* ruling (*ibid* at 35-36) that resulted in the wording of the law being changed. For Begbie CJ’s judgment in *He-ma-sak* case see RG10 vol 3628, file 6244-1 (1889).

<sup>14</sup> Daly, *supra* note 5 at 307, n 2; Cole & Chaikin, *supra* note 12 at 6.

<sup>15</sup> Sm’ooygit Hannamauxw, “Preface” in Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notebooks* (Vancouver: UBC Press, 2000) ix at ix; Anderson & Halpin, *supra* note 6 at 253, n 1; Peggy Brock, *The Many Voyages of Arthur Wellington Clah: A Tsimshian Man on the Pacific Northwest Coast* (Vancouver: UBC Press, 2011) at 178.

allow more flexibility for Aboriginal litigants and their claims.<sup>16</sup> Partly, this is due to the uncertainty over how to define and differentiate the two terms—both in the courts and in the ethnographic record—and so by adopting the more general term more flexibility is allowed as each specific group of Aboriginal claimants can use the appropriate terms—in their own language—for their claims. It is important to be mindful, though, that not all Aboriginal communities along coastal British Columbia have recovered from the (continuing) effects of colonialism and colonial policies. Thus, there is variation among these peoples in terms of the readiness and abilities of specific Aboriginal communities to apply their laws performed through the potlatch complex. Such variation should not be used as an added burden by the Court or the Crown—as this would perpetuate colonial injustices. The ability to use appropriate, internal terms as well as allowing specific Aboriginal communities, nations etc. the ability to decide their preparedness to apply their laws in litigation are both in-line with the Court’s position that the “scope and content [of Aboriginal rights] must be determined on a case-by-case basis”<sup>17</sup> as well as the “aboriginal specificity” that the Court has stated is what the phrase “distinctive culture” in their test for Aboriginal rights is supposed to capture.<sup>18</sup>

Further, in suggesting that not all Aboriginal communities are currently prepared and able to interweave their laws and legal systems with the Canadian legal systems into an intersocietal meshwork *does not* imply anything about their existing Aboriginal rights. *True* reconciliation not only involves this intersocietal weaving, but should also be reciprocal and beneficial to the Aboriginal communities as they work at reviving and strengthening their laws, legal systems and

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<sup>16</sup> Again, for a more full discussion of why I have chosen to refer to these gatherings as the “potlatch complex” see Ebert, “Feasting”, *supra* note 4. When talking about a specific peoples, I try to use the more culturally appropriate/preferred English term when possible.

<sup>17</sup> *R v Van der Peet*, [1996] 2 SCR 507 at para 69.

<sup>18</sup> *R v Sappier; R v Gray*, [2006] 2 SCR 686 at paras 42-45.

the cultural meshworks in which they are intertwined.<sup>19</sup> This is a process that is not only important for Aboriginal communities, but also, as John Borrows has asserted, is important for Canadian society as a whole and will improve and expand the Canadian legal system.<sup>20</sup>

Returning to the potlatch complex: while the impetus for the gatherings by a particular peoples encapsulated within the institution varies, it is possible to identify some general commonalities; with perhaps the most significant feature of the potlatching complex being, as mentioned above, the coming together of peoples and social units (be they a House, clan, and so on) in a public venue so that claims being made and privileges displayed by the host(s) can be recognized, witnessed, and validated through the ceremonial distribution of property and goods.<sup>21</sup>

The forum provided by feasting or potlatching is important in decision-making throughout time. Through speeches and other performances, through food and gifting, the host(s) makes clear, or presents, to the gathered witnesses their jurisdiction.<sup>22</sup> Through the negotiations leading up to and the proceedings during the event “differences of opinion can be aired calmly and witnessed, thus setting in motion the process of resolving the disagreement” as well.<sup>23</sup> Thus the potlatch complex has an important role in consensus- and decision-making process.<sup>24</sup> These process are democratic in a sense that is similar in form to those in Canada and the United Kingdom, placing greater “to the thoughts of those with proven ability, experience, ... wisdom”

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<sup>19</sup> See e.g. Ebert, “Feasting”, *supra* note 4 at 22.

<sup>20</sup> See e.g. John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 7, 10, 22.

<sup>21</sup> See Homer G Barnett, “The Nature of the Potlatch” (1938) 40:3 *American Anthropologist* 349.

<sup>22</sup> Antonia Mills, *Eagle Down is Our Law: Witsuwit’en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) at 43.

<sup>23</sup> *Ibid* at 71.

<sup>24</sup> See e.g. Ebert, “Feasting”, *supra* note 4 at 29.

and status.<sup>25</sup> And so while authority is important in decision-making, it requires the specific forum and protocols provided via the potlatch complex.<sup>26</sup> Consensus—particularly about the history of the social unit and its territory and jurisdiction—is reached not only through negotiation, but through the “formal telling of oral histories in the Feast, together with the display of crests and the performance of the songs, witnessed and confirmed by the chiefs of other Houses’.”<sup>27</sup>

As a result of the continual assertion and validation of claims, the potlatch complex is a fluid *process* that is ever adapting to changing circumstances.<sup>28</sup> It is therefore ever changing and evolving as each gathering develops authority and jurisdiction further through the unfolding events in the feast hall: “Public behaviour is not only witnessed and remembered, but also comprises the historical record passed down through the memories of succeeding generations.”<sup>29</sup> And so the events that unfolded in the British Columbia Supreme Court (BCSC) in *Delgamuukw v. British Columbia*<sup>30</sup> were enfolded into Gitksan and Wet’suwet’en culture and legal systems:

My presence in this courtroom today will add to my House’s power, as it adds to the power of the other Gitksan and Wet’suwet’en Chiefs who will appear here or who will witness the proceedings. All of our roles, including yours, will be remembered in the histories that will be told by my grandchildren. Through the witnessing of all the histories, century after century, we have exercised our jurisdiction.<sup>31</sup>

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<sup>25</sup> Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22 at 35; Ebert, “Feasting”, *supra* note 4 at 29.

<sup>26</sup> *Ibid.*

<sup>27</sup> Gisday Wa & Delgam Uukw, *supra* note 2 at 26; Ebert, “Feasting”, *supra* note 4 at 29.

<sup>28</sup> As I will discuss in what follows, I frame this adaptability of the potlatch complex-as-process, and “culture” generally, as “cultural pragmatics” and it can be easily seen in the incorporation of European goods—particularly Hudson’s Bay blankets—into continuing gifting practices. See Mark Ebert, *To A Different Canoe: A Study of Cultural Pragmatics and Continuity* (PhD Thesis, University of Aberdeen, 2006) [unpublished]. The introduction of these foreign goods has had significant sociocultural implications for the peoples of the Northwest Coast even though, again, the practices involved in the potlatch complex have been continuous.

<sup>29</sup> Daly, *supra* note 5 at 58.

<sup>30</sup> [1991] 5 CNLR 1.

<sup>31</sup> Gisday Wa & Delgam Uukw, *supra* note 2 at 8.

This is partly why any particular gathering is like a snapshot taken during a continually unfolding ontogenetic process<sup>32</sup> and the deliberative aspect to the potlatch complex has, according to Borrows, tremendous potential not only for the continued development and operation of the institution but for the development of Aboriginal law as well.<sup>33</sup> For example, much like the role of feasting by the Wet'suwet'en in the build up to *Delgamuukw*,<sup>34</sup> Borrows suggests that the declaration of law (in its general sense) in feast halls and other public settings allows “ancient and contemporary legal ideas [to] mingle together and become the basis for bylaws, statutes, conventions, and protocols.”<sup>35</sup>

Yet the use of the potlatch complex by the Court never seems to be in a positive way as an actual, true source of legal insight and laws etc. Instead, this central, integral institution is, among the other academic treatments noted above, often reduced to a redistributive mechanism<sup>36</sup>—but not on a large enough scale to permit commercial rights—or as a way to validate oral histories<sup>37</sup> (thereby giving it, or reducing to, the same importance/role as the archaeological record, and trader, missionary and explorer journals).

Yet as I will argue in this thesis, the potlatch complex is more than these atomized framings. This institution serves as a nexus in the cultural meshwork of these peoples and remains central to their Aboriginal rights, governments, laws, world views and social

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<sup>32</sup> See too Daly, *supra* note 5 at 57. While I discuss the reasoning behind this later in the thesis, my use of “ontogenetic process” and the potlatch complex as part of this is that the institution is, and is part of, a process of development that is continuous and grows and adapts to the contexts of its performance. As I will also attempt to make clear, I do not use the phrase in a metaphorical sense—as the Eurocentric perspective would infer—either. Many of the problems in the Court’s approach to Aboriginal peoples and their rights arise from the Eurocentric distinction of “nature” from “culture.”

<sup>33</sup> Borrows, *supra* note 20 at 41.

<sup>34</sup> Mills, *supra* note 22 at 44.

<sup>35</sup> *Supra* note 33 at 47.

<sup>36</sup> See e.g. *Ahousaht Indian Band v Canada (AG)*, [2010] 1 CNLR 1 at para 41.

<sup>37</sup> As in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 93 (SCC); *Lax Kw'alaams*, *supra* note 10 at para 41.

structures.<sup>38</sup> This meshwork, as we shall see later, not only envelops the present, but stretches out, enfolding the pre-contact, the past and the future.<sup>39</sup> And because this meshwork is fluid and dynamic, the potlatch complex could enfold the constitution and Canadians into it. This enfolding though is not a mirror image of the Court's translative approach to reconciling Aboriginal rights and perspectives with the common law and Crown sovereignty. Instead it would be through the process I have called "cultural pragmatics,"<sup>40</sup> in which continuity and change become two sides of the same coin.

(Re)situating the potlatch complex in its aboriginal meshwork raises questions over the Court's current approach to the constitutional interpretation of what an Aboriginal right is. It is an integral Aboriginal institution that varies based on the occasion for which they are being held, as well as on, according to some scholars at least, the social structure of the particular peoples.<sup>41</sup> Thus, while "potlatching" can be said to be an activity common to all peoples of the Northwest Coast, much like my argument regarding cultural universals in Part I, the particular practices are manifestations of specific traditions, customs, practices, and "cultures." The potlatch complex, then, easily meets, at a minimum, the integrality test developed by the Court and provides an instance of the Aboriginal perspective that can serve as a foil to the Court's attempt to establish a legal framework for Aboriginal rights within the constitution and to define the attributes of these rights. The potlatch complex, though, cannot be removed, isolated, and atomized from its aboriginal meshwork like the various levels of the Court's current approach to Aboriginal rights claims does. The benefits of this, and of my following trans-systemic proposal, is a much easier

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<sup>38</sup> See also Mills, *supra* note 22 at 43; Cole & Chaikin, *supra* note 12 at 12.

<sup>39</sup> See also Ebert, "Feasting", *supra* note 4 at 29.

<sup>40</sup> See *supra* note 28.

<sup>41</sup> See e.g. Rosman & Rubel, *supra* note 11; Roth, *supra* note 12 at 157-58, 214-18; JCH King, *First Peoples, First Contacts: Native Peoples of North America* (London: British Museum Press, 1999) at 150.

path to the reconciliation demanded by section 35 of the *Constitution Act, 1982*<sup>42</sup> and reinforced by the Court itself,<sup>43</sup> while avoiding all the pitfalls and problems encountered so far in litigation. In fact, I would even assert that the “Aboriginal perspective,” if truly—or, even, better—understood and/or incorporated, could provide many insights into not only the determination of Aboriginal rights but also in how the Aboriginal–non-Aboriginal state relationships could be structured.

With the table set thusly so far, let us turn to my argument in the following thesis. Chapter 1 lays the foundation for Part I of my thesis by exploring Chief Justice Lamer’s elaboration of the doctrine of Aboriginal rights in *R. v. Van der Peet*, focusing, in particular, on his discussion and use of the concepts of cultures, society, and community. These three concepts, particularly the first two, are the source of the confusion, problems, and contradictions in the Court’s approach to Aboriginal rights and in the chapters of Part I, I concentrate on the notion of “culture” and how the Court appears to formulate and treat it, discussing its intellectual foundations and the problems that follow for both the courts and Aboriginal litigants due to that conception. Part I is broken into three chapters based on the three phases of the test developed by Lamer in *Van der Peet*. In Chapter 2, focusing on the characterization of Aboriginal claimants’ ancestors and their practices, customs, traditions and “culture” that the contemporary claim is based on, continues exploring the notions of culture and society and their relationship as they are used in *Van der Peet* and point out that the resultant confusion is not necessary and how the Court cause the problems themselves. Irrespective of these problems and questions, “culture” was and remains the supposed focus in determining claims to Aboriginal rights. As a result, I then argue that it is important to understand the intellectual contexts and foundations of the

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<sup>42</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>43</sup> *Van der Peet*, *supra* note 17 at para 31.

Court's conception of culture. Thus I begin this discussion in chapter 2 by illustrating the materialism of their conception, including reasons why the Court adopts this stance, the implications of it, and how it is manifested in Aboriginal rights rulings. Materialism was, and continues to be, central in anthropological theories of evolution as well, and the arguments, taxonomies and conclusions reached in anthropology mirror—and have even influenced—the Court's conception, typologies and construction of Aboriginal peoples, and I discuss how all this is used to deny Aboriginal peoples their constitutionally entrenched rights.

By adopting a materialist stance, this allows culture to be objectified, and so I then turn to an implication of this that likewise underpins the *Van der Peet* test: the “atomization” of culture and practices into a collection of things-in-themselves. There, I show how this atomistic approach allows the Court to restrict claims to a narrow focus on “practices, customs and/or traditions,” thereby circumventing more general rights/protection such as to subsistence writ large or self-government/-determination. By combining their materialist and atomistic assumptions, I then go on to show how the Court dispositionalizes practices et al. so that the Court can generalize specific activities into, supposedly, an entire “culture.” Moreover, though contrary to their assertion that Aboriginal rights must be determined on a case-by-case basis,<sup>44</sup> the Court overlays their dispositionism, atomism and materialism with the categories and taxonomies they have imported into their decision-making, allowing them a sizeable amount of judicial discretion that frames their interpretation of evidence and claims.

The very irony of this dispositionist process of abstracting activities to a disembodied realm of culture leads into the second chapter of Part I where I focus on the “distinctive” aspect of the *Van der Peet* test and how the nature–culture dualism is involved in this requirement. By inverting lives in the world to a collection of cultural atoms, “culture” becomes essentialized,

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<sup>44</sup> See *supra* note 17.



homogenized and renders Aboriginal rights lifeless. This in turn allows the Court to apply their “categorical thought” and ignore the particular, reinforcing the boundedness of their conception of “culture.” I argue that this view pushes difference to the boundaries of these “objects,” generating the distinctiveness provision and further entrenches (and naturalizes) Eurocentric epistemology and categories as the implicit standard for determining Aboriginal rights claims. As a result of this, Aboriginal rights litigation conceals a power asymmetry that is revealed through the applications of the *Van der Peet* test and the Court’s reliance on Eurocentric categories. Moreover, I illustrate how the whole act of testing perpetuates the evolutionary thought, particularly regarding Indigenous peoples, of earlier times. This again further buttresses the power asymmetry, and contributes to marginalizing the Aboriginal perspective. As part of that discussion, I argue that the *Van der Peet* test is, at its core, a process of authentication and “discovery” by agents of the state.

In chapter 4, the final chapter of Part I, I explore the process through which the Court returns to the present once an Aboriginal right has been successfully proven to exist. This too involves determining authenticity through a process of validating contemporary “traditions” as “traditional” as I illustrate through both the continuity facet of the *Van der Peet* test and the doctrines of evolution. Similar to above, these also serve to further restrict what can be protected under s. 35(1) and thereby further controlling Aboriginal peoples and their lives. Perhaps the most perplexing aspect of the Court’s approach in this context is with regards to commercial Aboriginal rights and the reluctance, despite the economic conditions on many reservations in Canada, to grant any right beyond a “moderate livelihood.”

The overarching goal of Part I, then, is to show, irrespective of the SCC’s assertion that, again, “Aboriginal rights cannot,... be defined on the basis of the philosophical precepts of the

liberal enlightenment” and that Aboriginal rights are “intersocietal,”<sup>45</sup> the Court evinces a strong Eurocentric bias—even when they attempt to take the Aboriginal perspective into account—and that, in the end, a large proportion of the difficulties the Court run into while determining Aboriginal rights claims are of their own making. This flows, in particular, from the inversion/removal of Aboriginal rights from the world and the flux and flow of life via their conception of culture, and serve to reify and further entrench the dominance of Euro-Canadian society and legal system over Aboriginal peoples and their legal systems.

In Part I then, I set up an opening in which my proposal for Aboriginal rights being determined based on the insights derived from the anthropological theoretical perspective known as the relational approach can fit. And in Part II I lay out this initial proposal for a trans-systemic legal framework to “re-enliven” Aboriginal rights. But this proposed framework is only part of the story. And, as a result, I also explore the necessary convergence of Aboriginal legal systems and the common law that s. 35(1) demands. To illustrate how this convergence can occur, I return to the discussion of the potlatch complex above and further develop my preliminary exploration of how the potlatch system among those coastal First Nations peoples of British Columbia that are ready and prepared can be converged with judicial decision-making. I am highly skeptical that the potlatch complex, as used by the courts within the current Aboriginal rights framework, will ever be recognized and affirmed as a constitutional mechanism of certain Aboriginal peoples and considered as an existing Aboriginal right related to, among other things, constitutional governance, economics, and decision-making. Nonetheless, I can see, from a constitutional, anthropological, and law and culture perspectives, that the potlatch complex easily meets the integral to the distinctive culture test, and was and has remained a constitutional arena of traditions, customs, and practices of pre-contact Aboriginal peoples of the Northwest Coast

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<sup>45</sup> *Ibid* at paras 19, 42 [underlining in original].

region that should be comprehended—from the Aboriginal perspective—and honoured by the Crown and courts. My argument for this, and the above, will be slowly and methodically developed in this thesis from both a constitutional perspective as well as a legal anthropological perspective.

## Towards a Trans-Systemic Legal Framework

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

*per* Lamer C.J.<sup>1</sup>

This passage from Chief Justice Lamer’s decision in *R. v. Van der Peet* launched the contemporary understanding and jurisprudence of Aboriginal rights in Canada. But like the wooden horse the Greeks left behind at Troy, Lamer’s doctrine of Aboriginal rights contains within it numerous problems and issues—particularly for Aboriginal peoples’ claims.<sup>2</sup> These problems arise, not from the framework Lamer outlined above, but from the “soldiers” hidden within: the Eurocentric categories and their definitions that the Court has attempted to “fill in” the equine structure of their doctrine of Aboriginal rights with ever since. These categories are problematic as they are imported into law from the Eurocentric social sciences—particularly

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<sup>1</sup> *R v Van der Peet*, [1996] 2 SCR 507 at paras 30-31 [*Van der Peet*] [emphasis in original].

<sup>2</sup> In this thesis I use “Aboriginal” as it is defined in section 35(2) of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, so it includes the First Nations, Inuit and Métis peoples of Canada. Capitalized “Indigenous” is used more generally, in a similar fashion as implied by the United Nations Declaration on the Rights of Indigenous Peoples (2007, Doc A/61/L67), while “indigenous” is used in its adjectival sense as a state of being “native to.”

anthropology—and the Court’s attempt to define them creates ambiguity and uncertainty (among other issues). This lack of precision in Lamer’s basic framework creates a lack of coherence.

This incoherence in the categories is my starting point for the following thesis. But in my attempt to create a trans-systemic legal framework for determining Aboriginal rights, I seek to reformulate how the Court has conceived and defined the sloppy categories of their framework. Thus, instead of viewing Aboriginal rights like artefacts or containers, as I argue the Court does, my proposal is based on the continual movement of life—as a process—resulting in these rights, far from being finished objects arising through a process of making, are an interweaving growth of rights, legal systems, and lives.

So while “community” is a common law category,<sup>3</sup> the concepts of “society” and “culture,” central to the doctrine of Aboriginal rights, are, for the most part, imported in to the definitions and structure of the Court’s approach. The problems resulting from this importation are evident in the quoted passage above from *Van der Peet*, where we can read that Lamer C.J. believes that Aboriginal peoples *participate in* distinctive cultures,<sup>4</sup> while living in communities on the land in distinctive societies. They have been doing this for centuries, over which they have collectively organized and established distinctive societies that includes many different “cultures” with their own practices and traditions. These pre-existing distinctive societies of Aboriginal peoples inform and are acknowledged as the source of Aboriginal sovereignty and the *constitutional* doctrine of Aboriginal rights recognized and affirmed by section 35(1) of the

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<sup>3</sup> See e.g. *R v Powley*, [2003] 2 SCR 207 at para 12 (“A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life”) and *R v Gladue*, [1999] 1 SCR 688 at para 92 (“For all purposes, the term ‘community’ must be defined broadly so as to include any network of support and interaction that might be available in an urban centre”).

<sup>4</sup> Which, interestingly enough, seems to suggest a view of “culture” as a process or action. Unfortunately, as will be discussed in this thesis, the Court fails to notice or utilize this insight.

*Constitution Act, 1982*.<sup>5</sup> In this constitutional framework, the sovereignty of the Crown, as we can see above, “must be directed towards” a constitutional reconciliation with these pre-existing distinctive Aboriginal societies.

Chief Justice Lamer’s approach to the fact that Aboriginal peoples “lived on the land in distinctive societies, with their own practices, traditions and cultures” contains a number of contradictions and other problems. Perhaps the central or most significant contradiction being in how the Court seems to believe that “culture,” “community” and “society” are neutral, “objective” concepts, and not imported from a particular Eurocentric epistemology and naturalized when they are used to determine the scope of Aboriginal peoples’ rights. It is in this sense that the Court’s conception of “cultures” is a Trojan horse;<sup>6</sup> and throughout the following thesis, particularly in Part I, I point out the biases and problems inside. These pre-existing distinct societies and communities that are made up of distinct cultures are viewed by the Court as supposedly interchangeable Eurocentric categories. Even with the modification of them, in *R. v. Sappier*; *R. v. Gray*,<sup>7</sup> into “way of life,” this supposed interchangeability creates problems for Aboriginal claimants as well, as it creates uncertainty due to each term/category entailing different requirements, and the lack of clarity over which concept the Court will rely on. Thus, although the Court itself has acknowledged that “the concept of culture is itself inherently cultural,”<sup>8</sup> it appears that “cultures”—rather than the societies and communities that Lamer states are to be reconciled with the sovereignty of the Crown—remains at the core of the definition of

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<sup>5</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 20 [*Haida Nation*].

<sup>6</sup> Note that while I will be discussing more below regarding the Eurocentric concept of “culture,” in the above Aboriginal rights framework, Lamer *only* refers to “culture” in the plural.

<sup>7</sup> [2006] 2 SCR 686 [*Sappier*].

<sup>8</sup> *Ibid* at para 44. This acknowledgement by Justice Bastarache followed his discussion of the point made by Russel Barsh and James Youngblood Henderson regarding the idea of “culture” and Indigenous languages. Russel Lawrence Barsh & James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 McGill LJ 993 at 1002.

Aboriginal rights—regardless of Lamer’s exhortation that “Aboriginal rights cannot,... be defined on the basis of the philosophical precepts of the liberal enlightenment.”<sup>9</sup> Moreover, the lack of clarity in not only the Court’s use of these terms, but also, again, how each term is defined and relied on to determine the success of a claim for Aboriginal rights, allows a considerable amount of leeway for judicial discretion—something, as I will attempt to show, that rarely works in favour of Aboriginal claimants. This is partly because, as we shall see shortly, much of the intellectual thought that forms the background of the (Eurocentric) categories relied upon by the Court were developed in the contexts of colonialism. In other words, to continue with my metaphor, s. 35(1) and the constitutional doctrine of Aboriginal rights are the horse that conceals continuing colonial domination and biases within.

In this first chapter, I will provide an introduction into these biases and problems in the Court’s approach to Aboriginal rights, beginning with an overview of how the Eurocentric concepts of “culture” and “society” have been used over time as an exclusionary device. Perhaps, then, it is unsurprising that Aboriginal rights rulings have, by a wide margin, the most references to “culture”: both in comparison to other Supreme Court of Canada (SCC) rulings and also rather than to the broader concepts of “society” or “community” in which Chief Justice Lamer states Aboriginal cultures are organized into. Yet while *Van der Peet* alone uses the word over 200 times, the Court has still to clearly define it. This fact is one of the reasons I then argue for why anthropological thought and theorizing should have a more prominent role and influence in Aboriginal rights claims. That being said, like the Court, orthodox Eurocentric anthropology is also a product of the same intellectual context. So while ethnographic data remains useful, it does not, to adapt Chief Justice McEachern’s view of historical records, “speak for

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<sup>9</sup> *Van der Peet*, *supra* note 1 at para 19 [underlining in original].

themselves,”<sup>10</sup> as the records do not speak for the pre-existing Aboriginal societies that developed over the centuries: they can only speak for the intellectual traditions of Eurocentric society.

The theoretical perspective that has informed my background in anthropology—known as the relational or dwelling approach—works at overcoming a similar Eurocentric bias in orthodox anthropology. After providing an overview of the relational approach, I then go on to outline what I have previously called “cultural pragmatics.”<sup>11</sup> Then I will show how the biased orthodox approaches in both anthropology and jurisprudence differ from them. The goal of this contrast is to begin to open up a space in which I can introduce my proposal for a trans-systemic Aboriginal rights framework that is based on the relational approach.

## **I. Law and “Society”**

The concepts of “society” and “culture” have deep and troubling roots in Eurocentric positivist jurisprudence. While the nineteenth century development of an international law was supposedly framed around sovereignty, and relations between sovereign states, legal scholar Antony Anghie argues that the concept of society was central to the positivist formulation.<sup>12</sup> Not only was the concept of law “intimately” linked with the concept of society for the positivists, but “society” was crucial “because it enabled a distinction to be made between different types of states.”<sup>13</sup> The concept of society, then, allowed the establishment of the “sovereign European state,” which was

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<sup>10</sup> *Delgamuukw v BC*, [1991] 5 CNLR 1 at 43 (BCSC) [*Delgamuukw* (BCSC)].

<sup>11</sup> Please note that since originally formulating this concept, I have come across the use of this phrase in sociology (see e.g. Jeffrey C Alexander, Bernard Giesen & Jason L Mast, eds, *Social Performance: Symbolic Action, Cultural Pragmatics, and Ritual* (Cambridge: Cambridge University Press, 2006)). While some of this sociological usage of the phrase is based on the work of anthropologists, Victor Turner in particular, their use focuses mainly on ritual and other forms of symbolic action and performances (see e.g. Jeffrey C Alexander, “Cultural Pragmatics: Social Performance Between Ritual and Strategy” (2004) 22 *Sociological Theory* 527). As a result, my formulation and use of “cultural pragmatics” diverges significantly if not entirely.

<sup>12</sup> “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 *Harv Int’l LJ* 1 at 65.

<sup>13</sup> *Ibid.*



then inverted in the positivists' scheme so that the sovereign becomes supreme "by presenting itself as the means by which society comes into being and operates."<sup>14</sup> This is similar to what the political economist Eric Wolf has written regarding "society": following Max Weber's definition of political legitimacy as being a claim made by a state, Wolf argues that the concept of society is a "*claim*, not [a] substance or tangible reality" that is "advanced and enacted in order to construct a state of affairs that previously was not."<sup>15</sup> The anthropologist Tim Ingold adds to this that the idea of "society" as a claim also applies to the Eurocentric concept of nature (for the most part); with "the aggressive pursuit of these claims by agents with sufficient coercive power to impose their vision can greatly affect the circumstances under which people have had to lead their lives."<sup>16</sup> As a result, both of the concepts of society and of nature are "inherently and intensely political."<sup>17</sup> One result of this conception of society (and even of nature), similar to my discussion of Aboriginal rights claims as a process of "discovery" in chapter 3, sovereign states are installed at the top of a power and decision-making structure as the power to "recognize" new states is endowed in those states that are already "sovereign."<sup>18</sup>

The concept of society was also important in this positivist scheme as it became a metaphor "to posit the existence of rules that are observed even in the absence of a supreme authority."<sup>19</sup> Thus, as will be discussed further, society and law became intertwined in a "complicated interplay" that allowed the circular reasoning of international law being based on a "society of states" that by recognizing the latter implies the recognition of the former.<sup>20</sup> "Law,"

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<sup>14</sup> *Ibid.*

<sup>15</sup> Eric R Wolf, "Inventing society" (1988) 15 *American Ethnologist* 752 at 757.

<sup>16</sup> "Epilogue: Towards a Politics of Dwelling" (2005) 3:2 *Conservation & Society* 501 at 502.

<sup>17</sup> *Ibid* at 503.

<sup>18</sup> Anghie, *supra* note 12 at 65-66.

<sup>19</sup> *Ibid* at 16. The positivists needed this metaphor because by supposedly basing their framework on sovereignty, the nineteenth century jurists ran into a problem in terms of constructing an international law with no overarching sovereign in the international arena. *Ibid* at 16-17.

<sup>20</sup> *Ibid.*

then, instead of emanating from an Austinian sovereign resonates with the Hobbesian notion of “civil society”<sup>21</sup> where it is not imposed from above but arises through agreement between the relevant entities: “Law exists where there is regularities in dealings, when the members of the society regard themselves as bound by rules, and where sanctions of some sort would follow a breach.”<sup>22</sup> “Society,” along with “community” and “family,” became fundamental to the definition of law that the positivists developed during this era.<sup>23</sup> Further, this view of society as membership in a community also meant that to belong to the “society” of states in the positivist international law, existing European states had to accept non-European states into it and, by joining, agree to the rules regulating behaviour<sup>24</sup>—again highlighting how the social concept is inverted into a legal claim in the constructed international law.

The concept of society also allowed those positivists jurists and scholars, through another central distinction they made between civilized and uncivilized, to translate cultural difference into legal difference, thereby linking legal status to cultural distinction.<sup>25</sup> Civilized and uncivilized fit in through the positivists’ supposition that law, and particularly international law, was the exclusive province of the so-called “civilized” societies.<sup>26</sup> The circularity of law and society in this positivist framework is again highlighted as “law” was restricted to the “civilized” because of the positivist assumption that it was created by human societies and institutions.<sup>27</sup> By establishing this connection between “law” and “institutions” it then allowed jurists to focus on the attributes of the institutions which “facilitated the racialization of law by delimiting the

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<sup>21</sup> James (Sákéj) Youngblood Henderson, “The Context of the State of Nature” in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 11 at 18 [Henderson, “State of Nature”].

<sup>22</sup> Anghie, *supra* note 12 at 17.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* at 26-28.

<sup>26</sup> *Ibid* at 22.

<sup>27</sup> *Ibid* at 24.

notion of law to very specific European institutions.”<sup>28</sup> Thus, “society” and “law” became defined ethnocentrically, excluding the non-European from both. Moreover, by translating cultural difference into legal difference, Indigenous peoples were no longer accepted as sovereign (even if they were considered as such previously by European nations via treaty in the law of nations).

Following the positivist’s ethnocentric logic, Chief Justice Lamer focuses on the concept of society’s “operational role” as a mechanism that facilitated the linking with the alleged sovereignty of the Crown.<sup>29</sup> Lamer then conceptualized that the constitutional reconciliation of the (unquestioned) sovereignty of the Crown with pre-existing Aboriginal societies and communities that have lived on the land for centuries becomes the overarching purpose of s.

35(1). Both the reconciliation of pre-existing sovereignty of the Aboriginal societies with Crown sovereignty, as well as the *Van der Peet* test for Aboriginal rights, then represent the persistence

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<sup>28</sup> *Ibid* at 24-25. Perhaps this connection and resultant focus explains why the Court focuses on elements of claimants’ “culture” when determining Aboriginal rights claims.

<sup>29</sup> *Ibid* at 64. While this test—often referred to as the *Van der Peet* or the “integral to a/the distinctive culture” (or simply “integral/-ity”) test—was developed in *Van der Peet* by Lamer CJ. While it has been refined, to some extent by subsequent rulings, the basic structure he outlined in the ruling, and, perhaps more importantly, the background assumptions informing the test, remain. Lamer provides a general overview of this multistage test in paragraph 44 of *Van der Peet*:

In order to fulfil the purpose underlying s. 35(1) — i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions — the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

Justice Garson, in *Ahousaht Indian Band v Canada (AG)* ([2010] 1 CNLR 1 at para 31 [*Ahousaht*]), summarizes this “multi-tiered analysis” of Lamer into four steps thusly:

- a. characterizing the claimed aboriginal right;
- b. establishing the existence of the ancestral practice, custom or tradition advanced as supporting the claimed right;
- c. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the claimant's pre-contact society; and
- d. determining whether reasonable continuity exists between the pre-contact practice and the contemporary claim.

Lamer further developed the test by identifying ten factors that a court is to consider when applying his test. *Van der Peet*, *supra* note 1 at para 48ff. I will identify and discuss those factors pertinent to my argument as they come up over the course of this thesis.

of the *Baker Lake (Hamlet of) v. Minister of Indian and Northern Development*<sup>30</sup> “organized society” standard of a common law approach to Aboriginal title. Aboriginal claimants must prove that their pre-existing society and cultural elements of their society are worthy of recognition and affirmation—that they meet the standards of, and bridge the gap with, Eurocentric jurisprudence.<sup>31</sup>

## **II. Cultural Discrimination**

The nineteenth century development of “sovereignty doctrine” also involved the creation of “a complex vocabulary of cultural and racial discrimination” that, as alluded to, ethnocentrically defined European states as civilized and sovereign and gave them, in turn, the power to bestow or withhold the status of “sovereign” on others.<sup>32</sup> “Sovereignty,” then, becomes assimilationist as to be accepted into “international society” means that non-Europeans must conform to the European conceptions, thereby negating their independent power, authority, and authenticity as acquiring sovereignty was identified with the adoption of European “*civilization*.”<sup>33</sup>

Unfortunately, since *Van der Peet* the Court seems unaware (or, perhaps, unconcerned) with this discriminatory intellectual history<sup>34</sup> and continue to confuse and conflate the Eurocentric concepts of society and culture in its analysis of Aboriginal rights. I will discuss further in what follows other ways the courts have used “culture” and “society,” but the confusion over “culture” is further compounded by the courts’ use of cultures within a

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<sup>30</sup> [1980] 1 FC 518.

<sup>31</sup> Though, as I will discuss shortly, the “bridging the gap” aspect depends on whether the Court emphasizes the “distinctive” or “cognizable” aspects of the test for Aboriginal rights.

<sup>32</sup> Anghie, *supra* note 12 at 66.

<sup>33</sup> *Ibid* at 70.

<sup>34</sup> Granted, Anghie does describe how, as I have alluded to, much of the construction of this nineteenth century positivist framework became hidden and naturalized. See e.g. *ibid* at 67-68.

“community” and also “social organization/structure.”<sup>35</sup> Moreover, the Court in *Sappier* is suggested by some as being where the courts have reinterpreted “culture,” adopting the notion of Aboriginal “way of life,”<sup>36</sup> but, as I will argue, this shift in the thinking of the Court is superficial, ignoring or circumventing the background assumptions and intellectual genealogy that “culture” is founded upon in Eurocentrism.

Ronald Niezen, a cultural anthropologist who has written on Indigenous rights, has also pointed out that “culture,” a concept generally associated with the discipline of anthropology, has entered into the realm of law via the evidence of expert witnesses and has developed in the *Van der Peet* decision into a source of distinct rights.<sup>37</sup> Niezen is only partly correct with this point: as commentators have drawn attention to, the fact that while the courts have asserted that Aboriginal rights are based on the prior occupation and use of the land,<sup>38</sup> part of the elaborate test for Aboriginal rights developed by the courts relies on an analysis of “culture”—particularly “distinctive culture.” Such a focus further complicates Aboriginal rights as the anthropologist Michael Asch argues that this gives their determination an arbitrariness depending on whether the Court places weight on the “distinctive” or the “cognizable” aspects of the *Van der Peet*

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<sup>35</sup> Though, as I touched on above, at least the concept of “community” was part of the nineteenth century construction of an international law framework.

<sup>36</sup> Though, at least, the phrase “way of life” has been used in rulings prior to *Sappier*. See the discussion in chapter 5.

<sup>37</sup> “Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada” (2003) 18:2 CJLS 1 at 1.

<sup>38</sup> See, for example, Michael Asch, “The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*” (2000) 5 Rev Const Stud 119 at 133 [Asch, “Judicial Conceptualization”], where Michael Asch notes, as did Lamer CJ in *Van der Peet* (*supra* note 1 at paras 33, 61), that this approach to Aboriginal rights is supported by the Court’s earlier ruling in *Calder v Attorney-General of British Columbia* (*infra*, note 60). *Calder*, a title case, uses the concept of “culture” the most, relative to “community” and “society,” with culture appearing fifteen times; the majority of which is “culture” in the singular, though more than half of the occurrences occur in quotations or in the recounting of testimony. “Community” has the second most appearances—but is never used by the Court themselves (most uses are in quotes with a few appearing in testimony). The Court used “societies” twice itself, while “society” only appears in quotes. As I will return to in chapters 4 and 5, the lack of these terms in *Calder* is perhaps why Lamer delineated separate tests for Aboriginal rights and Aboriginal title.

test.<sup>39</sup> In addition, I point out in chapters 3 and 4, that depending on how far a court follows the underlying logic of the test for Aboriginal rights, different standards come into play, resulting in Aboriginal rights claims becoming akin to a case-by-case lottery. Such arbitrariness and uncertainty stands in direct contradiction to the Eurocentric, technocratic assumptions of the common law and its jurisprudence.<sup>40</sup>

Perhaps unsurprisingly, then, in constitutional litigation Aboriginal rights claims have the greatest reference to cultural issues and *Van der Peet*, at least up until 2003, used the word “culture” (in its nounal and adjectival senses) 213 times—more than triple of the occurrences in the ruling with the next most mentions.<sup>41</sup> Yet in Neil Vallance’s survey of the Court’s decisions since 1982, *none* of the 165 cases that contain the words “culture” or “cultural” define either term.<sup>42</sup> Since 2002, when Vallance’s survey ends, in the cases I reviewed for this thesis only

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<sup>39</sup> Asch, “Judicial Conceptualization”, *supra* note 38 at 133.

<sup>40</sup> See e.g. *Van der Peet*, *supra* note 1 at para 257; Anghie, *supra* note 12 at 19-20; Anthony Connolly, “Judicial Conceptions of Tradition in Canadian Aboriginal Rights Law” (2006) 7 *The Asia Pacific Journal of Anthropology* 27 at 35.

<sup>41</sup> Neil Vallance, *The Use of the Term “Culture” By the Supreme Court of Canada: A Comparison of Aboriginal and Non-Aboriginal Cases Since 1982* (MA Thesis, University of Victoria, 2003) at 32, 110 [Vallance, *Use of the Term “Culture”*] [unpublished], “The Misuse of ‘Culture’ by the Supreme Court of Canada” in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 97 at 99 [Vallance, “Misuse of ‘Culture’”]. “Culture”/“cultural” appear 62 times, the second highest combined use, in *R v Gladstone* ([1996] 2 SCR 723). Vallance, *Use of the Term “Culture”* at 110. These statistics are based on Neil Vallance’s survey of SCC rulings between 1982 and 2002. *Ibid* at 24. Granted, Vallance’s numbers are a bit skewed, as he includes in his word counts occurrences in sources cited (*ibid* at 32) and in the headnotes. In the actual judgment and dissenting opinions I found “culture” used 154 times, “cultures” 25, and “cultural” another three times, for a total of 182. In contrast, “society” and its derivations appear only 120 times *in total*: with “society” used 71 times, “societies” 46, and “societal” another three times (though one instance of which is as part of “intersocietal”). “Community,” both in the singular and in the plural, appears 40 times (32 and eight respectively) and “way of life” appears seven times.

<sup>42</sup> Sákéj Henderson has also reminded me that the Court has not defined “practice” either. Although the concept may seem fairly straightforward in isolation, what distinguishes it, if anything, from the concepts of activity, custom, or tradition is far from clear. And while Lamer CJ defines “tradition” in *Van der Peet* (*supra* note 1 at para 40), the dictionary definition he uses, as I discuss in chapters 3 and 4, is more to do with continuity and is more in terms of time, as Lamer defines it in the contexts of its use, as an adjective, in “traditional laws” and “traditional customs.” What the “tradition” in the Court’s rote mantra of “practice, custom and/or tradition” is left undefined. My point regarding Lamer’s definition of tradition is supported by Anthony Connolly who discusses the Court’s use of the concept in the contexts of continuity. There, Connolly points out the ambiguity in the Court’s use of the concept and how, in determining continuity, “tradition” provides a “zone of judicial discretion” for whether or not a “claimant set of *practices*” should be legally recognized and affirmed. *Supra* note 40 at 34-35 [emphasis added]. Note how Connolly appears to suggest that the concept of tradition as used by the Court equates with *practice(s)*. Whether

*Sappier* comes close to defining “culture”: “What is meant by ‘culture’ is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits.”<sup>43</sup> Importantly, by defining “culture” as a pre-contact way of life, it is supposedly distinguished from Eurocentric conceptions of culture. And while Justice Bastarache may not have realized this distinction, my trans-systemic framework also relies on the notion of “way of life.” But instead of equating it with culture, I place emphasis on the word “life.” Bastarache’s equation of way of life with culture is evidenced by the context in which his definition appears: similar to when it is defined in other post-2002 rulings I reviewed,<sup>44</sup> this definition appears within the contexts of describing the *Van der Peet* “integral to a distinctive [pre-contact] culture” test.<sup>45</sup> This appears to be a continuation of the trend that Vallance noticed, as he found that in the six Aboriginal rights rulings delivered in 1996 (the year with the most uses in his survey) “culture” was most often used in the phrase “distinctive culture.”<sup>46</sup> Typically, the phrase is also not placed within the context of a pre-existing society or community as Chief Justice Lamer asserted in *Van der Peet*—highlighting the incongruity of “culture” being at the core of Aboriginal rights. This approach to “culture” further highlights some of the other issues already alluded to above.

Moreover, in direct contrast to my trans-systemic framework, this context for the judicial use of “culture” is independent from and outside of “the fact that aboriginals lived on the land in

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such an equation provides any insights into the Court’s other use of the concept is questionable though, given their rote mantra which distinguishes “practice” from “tradition” (and “custom” as well).

<sup>43</sup> *Supra* note 7 at para 45. The post-2002 cases I have reviewed also include rulings from the British Columbia Supreme Court (BCSC) and Court of Appeal (BCCA). When the Court does provide a definition in those cases, they all cite and/or quote this definition from *Sappier*.

<sup>44</sup> Though many of those rulings did not define the term.

<sup>45</sup> See e.g. *Ahousaht*, *supra* note 29 at para 284; *Lax Kw’alaams Indian Band v Canada (AG)*, [2008] 3 CNLR 158 at para 10.

<sup>46</sup> *Use of the Term “Culture”*, *supra* note 41 at 46.

distinctive societies, with their own practices, traditions and cultures.”<sup>47</sup> This use, as we shall see, allows “culture” to be objectified, essentialized and atomized, removing peoples’ lived lives in the world.

“Culture,” then, and *not* society or community, becomes the judicial focus in defining Aboriginal rights, and as a result anthropology—as providing evidence of culture or cultures—should have more influence in such cases. This is also supported by the role of “society” and the distinction of civilized from uncivilized in the nineteenth century positivist international law discussed above. By making this distinction between civilized and uncivilized, positivists then turned to anthropology to not only elaborate on the characteristics of the latter but it was also used to determine what degree of “civilization” a people had reached and, accordingly, their international legal status.<sup>48</sup> Thus, there is a lengthy tradition in Eurocentric law, and colonial control, of importing and utilizing the knowledge and insights provided by Eurocentric social sciences. This judicial use of culture perhaps explains why the vast majority of outsider expert witnesses, particularly those of Aboriginal claimants, are anthropologists (including archaeologists).<sup>49</sup> Moreover, anthropology is the Eurocentric academic discipline that, for the most part, created the contemporary idea of culture and traditionally studies culture and cultural diversity.<sup>50</sup> And while some restrict their definition of anthropology to it being the Eurocentric discipline that studies *other* cultures,<sup>51</sup> this seems a bit peculiar given the “postmodern turn” in

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<sup>47</sup> *Van der Peet*, *supra* note 1 at para 31.

<sup>48</sup> *Anghie*, *supra* note 12 at 32, 46.

<sup>49</sup> The importance of anthropological expertise for expert witnesses is also apparent in the Crown’s objection to the testimony of Ms. Andrea Bear Nicholas, who was, at the time, the chair of the Native Studies department at St. Thomas University, because she “had no expertise in either anthropology or archaeology.” *Sappier*, *supra* note 7 (Factum of the New Brunswick Forest Products Association at para 44).

<sup>50</sup> Due, in part, to an academic division of labour arising through the Cartesian dualism. See e.g. Tim Ingold, “From complementarity to obviation: on dissolving the boundaries between social and biological anthropology, archaeology and psychology” (1998) 123 *Zeitschrift für Ethnologie* 21 at 22-23. For a discussion of the Cartesian dualism and, in particular, how I use it in the following, see *infra* note 79.

<sup>51</sup> See e.g. Michael Asch, “Errors in *Delgamuukw*: An Anthropological Perspective” in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books & The Institute



anthropology, where, to adopt the wording of the influential French sociologist of science Bruno Latour,<sup>52</sup> anthropology “came home from the tropics,” and began studying segments of “our own culture.”<sup>53</sup> I have placed “our own culture” in quotation marks because it is a problematic notion. In what follows I will discuss two contradictory uses of the concept of culture in anthropology, but the definition of anthropology as the study of other cultures is based on the same pre-eminence given to rationality in the Eurocentric epistemology, and by defining anthropology in this manner creates a contradiction that likewise haunts the judicial approach to Aboriginal culture: “If in the very act of identifying a form of life as a culture we dissociate ourselves from it, taking up a position of outsider spectators rather than insider participants, then the very notion of ‘our culture’ must be a contradiction in terms.”<sup>54</sup> Ingold suggests that this may account for why it is so difficult to express what “our culture” is.<sup>55</sup> Ingold goes on to outline the difficulties with various attempts at responding to this question,<sup>56</sup> but a moment’s reflection on even expressing what “Canadian culture” is, highlights how problematic and essentialist the notion of “our culture” is. Who does the “our” of “our culture” refer to as well? And why is it treated as a privileged or superior perspective?

Further, Latour argues that anthropologists re-created the exoticism of studying “other” cultures that was sacrificed when anthropology “came home” “by studying only the margins and

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for Research on Public Policy, 1992) 221 at 222-23 [Asch, “Errors”]; Nigel Rapport & Joanna Overing, *Social and Cultural Anthropology: The Key Concepts*, 2d ed (London: Routledge, 2007) at 109.

<sup>52</sup> *We Have Never Been Modern* (Cambridge MA: Harvard University Press, 1993) at 100.

<sup>53</sup> For example, anthropologists have written ethnographies on crack dealers in Spanish Harlem (Philippe Bourgois, *In Search of Respect: Selling Crack in El Barrio* (Cambridge: Cambridge University Press, 1996)), high particle physicists (Sharon Traweek, *Beamtimes & Lifetimes: The World of High Energy Physicists* (Cambridge, MA: Harvard University Press, 1988)), walking in the city and countryside of northeast Scotland (Jo Lee Vergunst, “Taking a Trip & Taking Care in Everyday Life” in Tim Ingold & Jo Lee Vergunst, eds, *Ways of Walking: Ethnography & Practice on Foot* (Aldershot, England: Ashgate, 2008) 105), and bikers in western Canada (Daniel R Wolf, *The Rebels: A Brotherhood of Outlaw Bikers* (Toronto: University of Toronto Press, 1991).

<sup>54</sup> Tim Ingold, “The Art of Translation in a Continuous World” in Gísli Pálsson, ed, *Beyond Boundaries: Understanding, Translation, and Anthropological Discourse* (Oxford: Berg, 1993) 210 at 213.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid* at 214-17.

fractures of rationality, or the realms beyond rationality” thereby creating, or reproducing, the disengagement found in studying the Other.<sup>57</sup> Thus, this “postmodern turn” maintains the assumptions of Eurocentrism. This is one of the reasons, as discussed in more detail in the following chapters, why the relational approach, and especially cultural pragmatics, is more appropriate for developing a trans-systemic framework for Aboriginal rights that I attempt here.

Importing and applying anthropological theories, methods, and perspectives to the common law—beyond anthropological critiques of rulings and of the Court—was also suggested by the renowned American jurist Oliver Wendell Holmes, who, in an 1899 address to the New York State Bar Association, stated that “it is perfectly proper to regard and study the law simply as a *great anthropological document*.”<sup>58</sup> His reasoning for this assertion is that laws and legal doctrines are the “final form of expression” of a society’s ideals, and so the study of law is “an exercise in the morphology and transformation of human ideas.”<sup>59</sup> Such a view of law seems to be reflected in Justice Hall’s opinion in *Calder v. Attorney-General of British Columbia* where he argued,

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.<sup>60</sup>

We can see a further shift or transformation of Canadian constitutional law towards Aboriginal peoples with the entrenchment of Aboriginal rights in the *Constitution*. But while the recognition and affirmation of Aboriginal rights has resulted in the SCC’s longstanding opinion that “a court

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<sup>57</sup> *Supra* note 52 at 100.

<sup>58</sup> “Law in Science and Science in Law” (1899) 12 Harvard L Rev 443 at 444 [emphasis added].

<sup>59</sup> *Ibid.*

<sup>60</sup> [1973] SCR 313 at 346 [*Calder*]. To further reinforce the connections/similarities between Holmes’ and Justice Hall’s statements is that for a time, the *Indian Act* did *not* include “Indians” in its definition of “person.” See e.g. James (Sákéj) Youngblood Henderson, “Dialogical Governance: A Mechanism of Constitutional Governance” (2009) 72 Sask L Rev 29 at 32.

must take into account the perspective of the aboriginal people claiming the right,”<sup>61</sup> this should not be merely subterfuge that conceals the power imbalances between Aboriginal peoples and the Crown. The Court has worried that in taking account of the Aboriginal perspective in constitutional analysis, the “exotic” and distinct Aboriginal perspectives “must be framed in terms cognizable to the Canadian legal and constitutional structure.”<sup>62</sup> Yet this approach to the definition of Aboriginal rights forgets (or ignores) that Aboriginal rights are a recognized part of the constitutional structure—*not* outside of it. Moreover, this position only begs the question of what kind of constitutional reconciliation is possible if Aboriginal rights have to be cognizable with the alleged sovereignty of the Crown. Particularly, as the courts have stated, when “[b]alance and compromise are inherent in the notion of reconciliation.”<sup>63</sup>

Thus, it appears that both the Eurocentric anthropological knowledge as well as the Court’s approach to Aboriginal rights have undergone changes, in practice, though, the change is only superficial. It is my contention, as mentioned above, that the problem lies in the background assumptions of the common law system and the importing of Eurocentric concepts and categories to comprehend the pre-existing societies of Aboriginal peoples and their cultures. This contention parallels one of the concerns in John Borrows’ recent book *Canada’s Indigenous Constitution*: “While Canadians have much to celebrate because of our law, we simultaneously continue to suffer from conflicts rooted in long-standing disputes about the legitimacy of its origins and the justice of its contemporary application. The circumstances of Indigenous peoples

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<sup>61</sup> *Van der Peet*, *supra* note 1 at para 49, citing *R v Sparrow*, [1990] 1 SCR 1075 at 1112.

<sup>62</sup> *Van der Peet*, *supra* note 1 at para 49.

<sup>63</sup> *Haida Nation*, *supra* note 5 at para 50. The Court has asserted numerous times that reconciliation is, or, at least, should be, a result of political negotiation rather than litigation (e.g. *ibid* at para 14) or that litigation is “part of a larger process of reconciliation between [Aboriginal peoples] and the broader Canadian society.” *Tsilhqot’in Nation v British Columbia*, [2008] 1 CNLR 112 at para 18 (see too at para 21). Yet the lack of progress after various constitutional conferences and the seeming unwillingness of, particularly, the British Columbia provincial government to negotiate, it appears that the courts are the only viable option for attempting reconciliation at the moment. My proposed trans-systemic framework, on the other hand, implies a process of ongoing negotiation between equal partners in a shared Canadian sovereignty.

illustrate one such tension.”<sup>64</sup> “Put simply,” Borrows continues, “the continent’s original inhabitants have never been convinced that the rule of law lies at the heart of their experiences with others in this land. In this respect, Canada’s legal system is incomplete.”<sup>65</sup> This lack of confidence is a product of the common law and now constitutional treatment of Aboriginal practices and legal systems: “Many Indigenous peoples believe that their laws provide significant context and detail for judging our relationships with the land, and with one another. Yet Indigenous laws are often ignored, diminished, or denied as being relevant or authoritative in answering these questions.”<sup>66</sup> And, as just mentioned, the courts’ “cognizable” approach is an instance of this treatment and only serves to reify and perpetuate the hierarchy of “cultures” and legal traditions in Canada, which is inconsistent with constitutional supremacy in s. 52(1) of the *Constitution Act, 1982*.

Borrows’ proposal, though, for creating a trans-systemic legal framework that acknowledges the “traditional”<sup>67</sup> and contemporary place of Aboriginal legal systems among Canada’s other legal traditions does involve, like all other traditions, a process of translation to properly understand them.<sup>68</sup> Unlike the courts’ “cognizable” approach to this translatable process, Borrows argues that “one must be careful that such translations do not always flow one way, to the benefit of the dominant systems.”<sup>69</sup> Borrows contends that better words, phrases, and frameworks need to be found to facilitate and acknowledge the coexistence of the common law

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<sup>64</sup> (Toronto: University of Toronto Press, 2010) at 6 [Borrows, *Indigenous Constitution*].

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> My reasons for putting traditional in quote marks will be drawn out in subsequent chapters. See also Mark Ebert, *To A Different Canoe: A Study of Cultural Pragmatics and Continuity* (PhD Thesis, University of Aberdeen, 2006) [unpublished].

<sup>68</sup> Borrows, *Indigenous Constitution*, *supra* note 64 at 118.

<sup>69</sup> *Ibid.*

and Aboriginal law.<sup>70</sup> Harold Berman, talking more generally about the Eurocentric legal tradition, also suggests that a more broader conception of law is needed and that a social theory of law needs to develop a “common legal language” for all traditions to help the Western legal tradition out of its late twentieth century “crisis.”<sup>71</sup> Similarly, Clifford Geertz, one of the few scholars that jurists seem to acknowledge in terms of anthropology, suggests that what he calls a “hermeneutics of legal pluralism” implies “an expansion of established modes of discourse, in the case at hand those of anthropology and comparative law, in such a way as to make possible cogent remarks about matters normally foreign to them.”<sup>72</sup>

Now most of the anthropological critiques and discussions of the courts’ use of “culture”—“one of the two or three most complicated words in the English language”<sup>73</sup>—have relied on Eurocentric orthodox approaches to culture and Aboriginal peoples, rather than Aboriginal concepts. For example, in Asch’s excellent work, he looked at five university introductory-level anthropology textbooks published over a twenty year period to distill certain common aspects to the anthropological descriptions and definitions of “culture.”<sup>74</sup> Four of the common points of definition he found are:

1. Culture is an attribute of *all* human societies.
2. Culture includes rules and/or behaviour regarding virtually all aspects of human social life.
3. Culture is passed from one generation to another by learning rather than by instinct.

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<sup>70</sup> I realize that in Canada civil law is also a legal tradition, but since all the court decisions I am concerned with in this thesis were tried in the common law system, I will not be addressing the civil system.

<sup>71</sup> *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 45.

<sup>72</sup> *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 225.

<sup>73</sup> Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, revised ed (New York: Oxford University Press, 1983) at 87.

<sup>74</sup> “Errors”, *supra* note 51 at 224.

4. Virtually all human social behaviour is based on patterns that are cultural and learned rather than inherited genetically through biological processes.<sup>75</sup>

Asch also points out that these traits are not limited to anthropology but that “they are found even in small, common usages dictionaries... which suggests that this concept,... forms a part of the shared understanding.”<sup>76</sup> Yet while Asch suggests that the Court’s legal theory of culture is founded primarily on the ethnocentric analytical framework advanced in *Re Southern Rhodesia*,<sup>77</sup> the judicial conceptualization of culture does not differ all that much from these commonalities above:<sup>78</sup> for example, Chief Justice Lamer in the epigraph accepts that cultures are attributes of Aboriginal society, that Aboriginal societies include their own practices, traditions, customs, and law, that they are passed on for centuries from one generation to another. And although the courts may, at times, privilege biology/instinct over the anthropological emphasis on the “culture”/learned pole of the Cartesian dualism,<sup>79</sup> both are constructed on Eurocentric knowledge and worldviews.<sup>80</sup>

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<sup>75</sup> *Ibid* [emphasis in original]. These commonalities are also fairly similar to the basic characteristics of Eurocentric law identified by Berman. *Supra* note 71 at 37.

<sup>76</sup> Asch, “Errors”, *supra* note 51 at 224-25.

<sup>77</sup> [1919] AC 211 (PC).

<sup>78</sup> Asch, “Judicial Conceptualization”, *supra* note 38 at 121. I do not intend this to be a criticism of Asch’s overall argument, here I am simply focusing on the conception of “culture” and will later more fully address the problems associated with the Court’s operationalizing the word.

<sup>79</sup> My usage of the notion of the Cartesian dualism is in line with what current conceptions of the dualism are. So while the Cartesian dualism, *per se*, originates and refers to René Descartes’ work and his distinction of mind from body (e.g. *Meditations on First Philosophy, With Selections from the Objections and Replies*, revised ed & translated by John Cottingham (Cambridge: Cambridge University Press, 1996) at 50-62), today I would argue that the dualism has also been extended to refer to an analogous distinction between nature and culture. This is a logical extension of mind–body, and is consistent with Descartes’ philosophizing as he asserts that the mind, similar to the vast majority of contemporary, orthodox Eurocentric conceptions of culture, is the seat of understanding and posits a disjuncture between sensory perception and the thought which produces understanding. Descartes’ whole *Meditations on First Philosophy* begins by him doubting all that he knows—even his own existence—though eventually admitting that it is “necessarily true” that he is a “thinking thing,” giving rise to his famous maxim of “*cogito ergo sum*” (I think, therefore I am). *Ibid* at 12, 18; see too René Descartes, *Principles of Philosophy*, translated, with explanatory notes, by Valentine Rodger Miller & Reese P Miller (Dordrecht, Holland: D Reidel Publishing Company, 1983) at 3-36, 39-40 [Descartes, *Principles*]. (Note, in this we can also see another related distinction between inside/interior and outside/exterior.) And while “culture” originally referred to biology or nature (in the sense of cultivation or tending), in the early sixteenth century its meaning was also broadened to include a process of human development that focused on the mind or cognition. Williams, *supra* note 73 at 87. (According to Raymond Williams this extended meaning was used by Thomas Hobbes as well. *Ibid.*) In the eighteenth century, this “process of human development” was synonymous with the noun “civilization” (*ibid* at 89) which, as we shall

So while there appears to be a place or need for Eurocentric anthropological knowledge, concepts and methods in Aboriginal rights litigation, orthodox anthropology is a product or manifestation of the same underlying ontology as the Canadian legal system. It is, then, not an entirely distinctive approach, but rather a variant of a common Eurocentric approach. The perspective that this thesis is based on—the relational, cultural pragmatics, or way of life approach—is partly focused on questioning the Eurocentric grounding of orthodox anthropological theorizing (which has been referred to in anthropology as the “genealogical model”<sup>81</sup>).

While the phrase “genealogical model” was coined within anthropological thought and theorizing and predominates in its traditional methods, it is not limited, as alluded to, to the discipline. Rather, its prevalence in anthropology reflects the Eurocentric cultural contexts and backgrounds of the vast majority of anthropologists—particularly in the early history of the discipline. The phrase “genealogical model,” though, is derived from the implications that the

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see in Part I of this thesis, has had significant and continuing implications—particularly for Indigenous peoples. Further highlighting Descartes’ implicit distinction between nature and culture, and of personhood, is his position that animals lacked thought because they do not have “real speech”—again, often another trait of culture in contemporary, orthodox Eurocentric definitions of culture. René Descartes, *The Philosophical Writings of Descartes*, translated by John Cottingham et al (Cambridge: Cambridge University Press, 1991) vol 3 at 366.

Finally, Descartes himself acknowledges that his philosophizing is not new but is “extremely ancient and commonplace.” Descartes, *Principles*, *supra* at 283. And Descartes was also not alone in the seventeenth century to rely on dualistic thought: Hobbes’ work, for example, was based on a contrast of a state of society that cured the “ills” of a state of nature and similarly distinguished humans from animals based on the former’s use of reason. Thomas Hobbes, *Leviathan* (New York: Penguin Books, 1968) at 188, 226. The distinctions of nature from culture and mind from body (hereinafter referred to as the Cartesian dualism) were central in the development of the contemporary Eurocentric scientific epistemology (and, as alluded to above, Eurocentric anthropology)—which Descartes was an important figure in. Noam Chomsky even goes as far to suggest that there are a number of similarities in the intellectual climate of the seventeenth century and today. Noam Chomsky, *Language and Mind*, 3d ed (Cambridge: Cambridge University Press, 2006) at 8. I will discuss aspects of this note and the Cartesian dualism more in what follows.

<sup>80</sup> Though even the idea of “worldview” is based on the precepts of Eurocentric epistemology and ontology, and, similar to “culture,” is founded on the Eurocentric separation of mind from world.

<sup>81</sup> See e.g. Tim Ingold, *The Perception of the Environment: Essays in livelihood, dwelling and skill* (London: Routledge, 2000) at 133-39 [Ingold, *Perception*].

centrality of kinship and of the “genealogical method” had in anthropology.<sup>82</sup> The genealogical method was developed by the physician–psychologist cum anthropologist W.H.R. Rivers in the first decade of the twentieth century.<sup>83</sup> It was proposed as a methodological tool that involved the recording of pedigrees, vital statistics and related information from Indigenous informants.<sup>84</sup> By collecting this data, Rivers felt that a researcher could then study various aspects of social organization including laws regulating descent, marriage and the inheritance of property, as well as other aspects of culture like migrations, magic and religion.<sup>85</sup> Moreover, Rivers asserted that a “complete genealogical record” could provide the foundation “to write a full and fairly accurate account of the recent history of a savage community” because “the genealogical details would give definiteness to the narrative [of historical events] and serve the same purpose as dates in the history of civilised communities.”<sup>86</sup> He also felt that this method allowed a researcher to study the animal part of human beings<sup>87</sup> and asserted that they provided the means by which the “facts of social organisation” could be as definitely demonstrated as any biological science.<sup>88</sup> Thus, the genealogical method was based on a belief in a process of parallel transmission—one cultural, one biological—that can be studied by eliciting a peoples’ pedigrees.

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<sup>82</sup> Mary Bouquet, “Genealogy in Anthropology” in Neil J Smelser & Paul B Baltes, eds, *International Encyclopedia of the Social & Behavioral Sciences* (New York: Elsevier, 2001) 6029 at 6029 [Bouquet, “Genealogy”]; Rapport & Overing, *supra* note 51 at 249, Tim Ingold, *Lines: A Brief History* (New York: Routledge, 2007) at 115 [Ingold, *Lines*].

<sup>83</sup> W.H.R. Rivers, “The Genealogical Method of Anthropological Inquiry” (1910) 3:1 *The Sociological Review* 1 [Rivers, “The Genealogical Method”]; Ingold, *Lines*, *supra* note 82 at 109.

<sup>84</sup> Rivers, “The Genealogical Method”, *supra* note 83 at 1-2; Joan Vincent, “Genealogical method” in Alan Barnard & Jonathan Spencer, eds, *Encyclopedia of Social and Cultural Anthropology* (London: Routledge, 1996) 262 at 262.

<sup>85</sup> Rivers, “The Genealogical Method”, *supra* note 83 at 7-8; Bouquet, “Genealogy”, *supra* note 82 at 6031.

<sup>86</sup> W.H.R. Rivers, “A Genealogical Method of Collecting Social and Vital Statistics” (1900) 30 *Journal of the Anthropological Institute of Great Britain and Ireland* 74 at 81-82.

<sup>87</sup> Mary Bouquet, “Family Trees and Their Affinities: The Visual Imperative of the Genealogical Diagram” (1996) 2 *Journal of the Royal Anthropological Institute* 43 at 45 [Bouquet, “Family Trees”].

<sup>88</sup> Rivers, “The Genealogical Method”, *supra* note 83 at 12; George W Stocking, Jr, “The Ethnographer’s Magic: Fieldwork in British Anthropology from Tylor to Malinowski” in George W Stocking, Jr, ed, *Observers Observed: Essays on Ethnographic Fieldwork, History of Anthropology*, vol 1 (Madison: University of Wisconsin Press, 1983) 70 at 87.



This approach is very similar to Chief Justice Lamer’s definition of “tradition,” as will be discussed further throughout the following chapters, where by relating it to ancestry, as he did with Aboriginal peoples’ prior occupation,<sup>89</sup> a peoples’ “pre-existing culture and customs” and “traditional laws” become “things-in-themselves” that are handed down, much like a relay baton, generation to generation from posterity.<sup>90</sup> A further similarity between Rivers’ genealogical method and Lamer’s approach to Aboriginal rights is that both are retrospective: the *Van der Peet* test looks to the pre-European contact period to establish contemporary rights, while Rivers asserted that “the greatest merit” of the genealogical method was that it allowed access to information that predates European influence.<sup>91</sup>

Commentators in anthropology have argued that Rivers’ transformation of ancestry into the genealogical method was accomplished through visualizing kinship by means of connecting lines.<sup>92</sup> This visualizing drew inspiration from European sacred, secular and scientific pedigrees such as family trees, the Tree of Jesse and other biblical imagery, Darwin’s diagram of natural selection, and the classical Roman *stemma*.<sup>93</sup> And while Mary Bouquet and Ingold differ over interpreting what imagery Rivers was mostly appealing to, both acknowledge the influence of the English aristocratic conception of pedigree that was adapted from animal breeders through which

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<sup>89</sup> *Van der Peet*, *supra* note 1 at para 32.

<sup>90</sup> *Ibid* at para 40.

<sup>91</sup> Rivers, “The Genealogical Method”, *supra* note 83 at 11.

<sup>92</sup> See e.g. Mary Bouquet, “Reply to Parkin’s Comment: Kinship with Trees” (1997) 3 *Journal of the Royal Anthropological Institute* 375 at 375.

<sup>93</sup> Bouquet, “Family Trees”, *supra* note 87, “Genealogy”, *supra* note 82 at 6030; Ingold, *Lines*, *supra* note 82 at 109-15. Both Mary Bouquet and Ingold also suggest that Darwin and other scientists around the same time drew their inspiration from family trees and biblical imagery. See e.g. Mary Bouquet, “Exhibiting knowledge: The trees of Dubois, Haeckel, Jesse and Rivers at the *Pithecanthropus* centennial exhibition” in Marilyn Strathern, ed, *Shifting Contexts: Transformations in Anthropological Knowledge* (New York: Routledge, 1995) 31 at 35. Darwin’s diagram of natural selection can be found in Paul H Barrett & RB Freeman, eds, *The Works of Charles Darwin*, vol 16, *The Origin of Species*, 1876 (New York: New York University Press, 1988) at 96-97 (it is also reproduced in Ingold, *Lines*, *supra* note 82 at 114). According to Berman, legal scholars have also had recourse to similar imagery. Changes in law, at least in the past, have been described via biological metaphor—particularly with regard to twelfth century (and onwards) and changes to English law regarding forms of action: “Scholars have drawn a tree to represent the forms of action, with trunk and branches and dates assigned, *like a genealogical tree*.” *Supra* note 71 at 6-7 [emphasis added].

the flow of “blood,” and its “purity,” was controlled and thereby served to distinguish the nobility from others.<sup>94</sup> This is the same approach as Chief Justice Lamer’s test for Aboriginal rights! Where the “practices, customs and traditions” of pre-existing Aboriginal societies are the “blood” that contemporary Aboriginal peoples have inherited, by way of genealogical connection, from their ancestors and that, in turn, serve to distinguish them (at least in terms of the Court’s perspective—not necessarily the claimants themselves). In Part I, I will argue that this distinguishing turns out to be in terms of their difference from an implicit and hidden standard: Eurocentrism.

### **III. Cultural Pragmatics and “Way of Life”**

One of the implications of the genealogical model and its Cartesian foundation is that its formulation of “culture” results in a bounded conception. Boundedness is one of the four interrelated features that anthropological criticism of this standard, Eurocentric conception of culture have focused on in the last twenty or so years.<sup>95</sup> Homogeneity, absence of change, and a lack of agency are the other features that the standard conception of “culture” in Eurocentric anthropology has been criticized for by myself and others,<sup>96</sup> but because I adopt the relational approach, my reasons and the outcomes differ from many of the other critics.

Furthermore, I have found in my life and in teaching that the relational approach provides a more fruitful and realistic means of describing and understanding life, or ways of life, as we live it. As I argue more fully in chapter 5, by taking the “animal-in-its-environment” as the point of departure, the relational approach is better able to comprehend lived ways of life. This is

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<sup>94</sup> Bouquet, “Family Trees”, *supra* note 87 at 45, 63 n 4, “Genealogy”, *supra* note 82 at 6030; Ingold, *Lines*, *supra* note 82 at 109. Thus, “the notion of pedigree would have been entirely familiar to [Rivers’] mainly British middle-class readers, and would no doubt have appealed to their ingrained snobbery.” *Ibid.*

<sup>95</sup> Vallance, “Misuse of ‘Culture’”, *supra* note 41 at 98.

<sup>96</sup> See e.g. Ebert, *supra* note 67 at chapter 1 in particular; and Vallance, *supra* note 41 at 97-99 for a general overview of some of the criticisms of the anthropological conception of “culture.”

because the relational approach dissolves the manifold, orthodox dichotomies derived from the Cartesian dualism<sup>97</sup> that inform the genealogical model's self-contained individual or ancestor.<sup>98</sup> The focus of the relational approach originated from the philosophical basis of Martin Heidegger's notion of *Dasein* ("being-in-the-world").<sup>99</sup> This idea of *Dasein* views human beings as being inseparable from the world and is achieved through a person's engagement with, or dwelling in, the world.<sup>100</sup> Such dwelling, according to Heidegger, is the basic character of existence and serves as the foundation for all thought and knowledge—even the supposed detached, objective reasoning of science.<sup>101</sup>

By taking dwelling or way of life as a foundational assumption, the relational approach is a way of understanding humans and human society based on our engagement with and in the world,<sup>102</sup> and is suggested as being more in accordance with people's lived experience within the world.<sup>103</sup> One implication of a relational understanding of peoples' dynamic engagement with the world is my notion of "cultural pragmatics." Based on my contention that the genealogical model of orthodox anthropology problematizes cultural dynamics due to its framing of change and continuity as opposites, I proposed this notion of "cultural pragmatics" in my PhD

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<sup>97</sup> Ingold, *Perception*, *supra* note 81 at 186-87.

<sup>98</sup> Because both the genealogical model and liberalism are products of Eurocentric epistemology, there are many similarities between them—to the point that they are often virtually synonymous. For a discussion of "ancestry" so formulated through the genealogical model, and how it contrasts with its formulation through the relational approach see Ingold, *Perception*, *supra* note 81 at 134-35 & 140-42.

<sup>99</sup> *Ibid* at 186.

<sup>100</sup> Pernille Gooch, "Being-in-the-world: The Phenomenology of Indigenesness" in Alf Hornborg & Mikael Kukiala, eds, *Voices of the Land: Identity and Ecology in the Margins* (Lund: Lund University Press, 1998) 289 at 305.

<sup>101</sup> Martin Heidegger, "Building Dwelling Thinking" in David Farrell Krell, ed, *Basic Writings: from Being and Time (1927) to The Task of Thinking (1964)* (New York: HarperCollins, 1993) 347 at 362; Ingold, *Perception*, *supra* note 81 at 186.

<sup>102</sup> Tim Ingold, "The Evolution of Society" in AC Fabian, ed, *Evolution: Society, Science and the Universe* (Cambridge: Cambridge University Press, 1998) 79 at 94.

<sup>103</sup> Ingold, *Perception*, *supra* note 81 at 133. In fact, those other doctoral students working with Indigenous peoples, and myself all wanted to study with Tim Ingold at the University of Aberdeen because the relational approach seemed to be the anthropological perspective that best reflected what we were hearing from Elders we worked with. See e.g. Allice Legat, *Walking the Land, Feeding the Fire: Becoming and Being Knowledgeable Among the Tâichô Dene* (PhD Thesis, University of Aberdeen, 2007) [unpublished].

dissertation, and defined it as the unfolding and enfolding of relationships during peoples' practical engagement with the world.<sup>104</sup> "Pragmatics," then, is not in the philosophical or linguistic senses or in the sense in which it is contrasted with dogmatic or principled. Rather, I used "pragmatics" in the sense of an adjective, referring to practicality as well as like the rolling out or unfolding in the original meaning of the idea of evolution.<sup>105</sup> As a result, the notion of cultural pragmatics views people's lives, beliefs, practices, and so on, as continually adjusting over time to the environmental, social, legal, and political contexts in which they find themselves.<sup>106</sup> This adaptive process generates and regenerates distinctive practices, traditions and cultures creating a social meshwork that Chief Justice Lamer discussed in the epigraph. Therefore, instead of being antagonistic, "change" and "continuity" form two sides of the same coin, enfolding into each other while they unfold as society, culture, and people dwell and grow.

Two examples of cultural pragmatics that I discussed in my dissertation involved European metals and blankets. In terms of the former, while there is evidence that the First Peoples of the Northwest Coast had access to metals—due, for example, to Japanese fishing boats being washed up on their shores<sup>107</sup>—Eurocentric tunnel history<sup>108</sup> gives pre-eminence to metal of European origins. Granted the iron from Europeans may of had a more significant impact—at least from the portrayal arising from the literature—and is suggested as being the impetus for the proliferation of monumental poles<sup>109</sup> in both quantity of poles and in the number

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<sup>104</sup> Ebert, *supra* note 67 at 5-10.

<sup>105</sup> *Ibid* at 5.

<sup>106</sup> *Ibid* at 24.

<sup>107</sup> See e.g. Richard White, *Land Use, Environment, and Social Change: The Shaping of Island County, Washington* (Seattle: University of Washington Press, 1999) at 3.

<sup>108</sup> See JM Blaut, *The Colonizer's Model of the World: Geographical Diffusion and Eurocentric History* (New York & London: The Guilford Press, 1993), *Eight Eurocentric Historians* (New York & London: The Guilford Press, 2000); and see text accompanying notes 83-88 in chapter 3 for a discussion of this concept.

<sup>109</sup> More commonly/popularly glossed as "totem poles."

of groups carving them.<sup>110</sup> European metals illustrate many aspects of cultural pragmatics: not only does the notion involve the assimilation of, in this context, metal tools into continuing practices (where the introduced tool/material replaces “traditional” tools or materials), but as with subsistence technologies, cultural pragmatics can also involve the assimilation of new/introduced things (be they material or immaterial) into continuing practices that do not replace an indigenous correlate, but are instead used in concert. Thus, metal replaced stone, shell or bone in some types of arrow points and harpoon blades, but bone and antler continued to be used for harpoon spurs and other arrow points.<sup>111</sup> And sometimes the interweaving of metal with indigenous materials was even tighter: as at least one Coast Salish man made spears that had bone barbs with metal points.<sup>112</sup>

Blankets illustrate other wrinkles or nuances to cultural pragmatics, as well as illustrating the view of culture as a meshwork. Blankets have always been an important item of corporeal wealth on the coast, and prior to contact they were made from, in the contexts of the Coast Salish of Washington State, the fleece of mountain goats and/or a local species of woolly dog.<sup>113</sup> With the introduction of European blankets there were a number of implications. First, the relationship between blankets and wealth shifted due to the ease by which trade blankets were to acquire and in larger quantities than the indigenous woven ones, and, as a result, took on an increasing role in gift exchanges and economy.<sup>114</sup> Trade blankets came to basically represent a type of currency in which the value of other items could be measured against. This, in turn, meant that they could

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<sup>110</sup> See e.g. Aldona Jonaitis, “Northwest Coast Totem Poles” in Ruth B Phillips & Christopher B Steiner, eds, *Unpacking Culture: Art and Commodity in Colonial and Postcolonial Worlds* (Berkeley: University of California Press, 1999) 104 at 106-09; Margaret B Blackman, “Creativity in Acculturation: Art, Architecture and Ceremony from the Northwest Coast” (1976) 23:4 *Ethnohistory* 387 at 391-92.

<sup>111</sup> Ebert, *supra* note 67 at 132-33.

<sup>112</sup> Jay Miller with Warren Snyder, “Suquamish Traditions” (1999) 33:1 *Northwest Anthropological Research Notes* 105 at 117-18.

<sup>113</sup> Ebert, *supra* note 67 at 127-28.

<sup>114</sup> *Ibid* at 128.

then be used as a measure of prestige or status.<sup>115</sup> For example, in the mid-nineteenth century one Hudson's Bay Company (HBC) blanket was said to be worth sixty fresh salmon.<sup>116</sup> But the increased prominence and quantity of HBC blankets did not mean the indigenous, hand-woven blankets were replaced.<sup>117</sup> Instead, the woven blankets gained in value and continued to be used for the most prestigious and sacred ceremonial purposes.<sup>118</sup> In other words, HBC blankets were assimilated into continuing practices and elevated, in appreciation of the labour and craftsmanship involved, the value of the hand-woven blankets.<sup>119</sup>

These examples of cultural pragmatics among the Coast Salish are just an instance of practices amongst many Indigenous peoples around the world: similar to blankets and metal carving tools and the resultant cultural flourishing, the Wiradjuri of Australia selectively adopted introduced technologies and practices that helped in strengthening and maintaining valued practices.<sup>120</sup> Echoing my discussion in chapter 5, this incorporation and adaptation of European objects and practices by the Wiradjuri is suggested as *not* being evidence of post-contact assimilation but, rather, of existing and continuing, pre-contact creativity.<sup>121</sup> As I will more fully argue later, to consider these dynamic processes as assimilation (qua "change") is only possible

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<sup>115</sup> *Ibid.* Blankets as a measure of prestige is due to the exchanges that occur during potlatches and feasts that serve to assert claims and have them validated. Therefore, the more blankets gifted reflected the status of the giver. See the discussion of the potlatch complex in the preface and in chapter 5.

<sup>116</sup> Crisca Bierwert, ed, *Lushootseed Texts: An Introduction to Puget Salish Narrative Aesthetics* (Lincoln: University of Nebraska Press, 1996) at 104.

<sup>117</sup> The Puget Sound woolly dog and the introduction of trade blankets also highlights the interweaving—and not disjuncture—of "nature" and "culture." The woolly dogs, raised for their hair, were mainly confined to the saltwater shores of the Puget Sound and were kept separate from the other breed of dog found in the region to avoid interbreeding. With the introduction of the trade blankets, these dogs became superfluous due to the relative ease in which the former could be obtained. As a result, the formerly numerous woolly dog became essentially extinct shortly after European contact. Ebert, *supra* note 67 at 127-28. Therefore, as their culture "changed," the world in which Coast Salish peoples' lives were intimately intertwined "changed" as well. Importantly, as I will discuss in chapters 4 and 5, this is "change" in the sense of (arbitrary) snapshots taken, and then compared, during a continuing process of ontogenetic development.

<sup>118</sup> Bierwert, *supra* note 116 at 104. For example, it has been suggested that one blanket made from mountain goat wool was estimated to have a value of ten HBC blankets or 600 salmon. *Ibid.*

<sup>119</sup> Ebert, *supra* note 67 at 129.

<sup>120</sup> Gaynor Macdonald, "Does 'culture' have 'history'?": Thinking about continuity and change in central New South Wales" (2001) 25 *Aboriginal History* 176 at 192.

<sup>121</sup> *Ibid.*

when viewed through the lens of the genealogical model of orthodox anthropology, which dichotomizes change and continuity, and dispositionalizes “changes” in technologies etc. as acculturation and culture loss—thereby supposedly bringing the validity of claims to Aboriginal rights into question.

The practical unfolding and enfolding involved in cultural pragmatics of ways of life is not necessarily positive though. At times it can be detrimental, such as with drug and alcohol addiction. Cultural pragmatics is, at its core, about societies, cultures, and people doing the best they can, or what they think is best, within the various situations and contexts they find themselves in. In some societies and their cultures, people are free to do what they think is best, but sometimes situations are forced on them. Clothing provides an example of this: prior to contact blankets made from combinations of pelts, wool, and cedar were used as robes, while other standard, everyday clothing was made of shredded cedar bark. Part of the “civilizing” of the Coast Salish peoples of the Puget Sound was the (forced) adoption of European clothing. Although the Coast Salish assimilated the new clothes into pre-existing, continuing practices—which even included making imitations of European dress in cedar bark and furs—this did not mean their lives were better as a result. Indigenous clothing reflected the pragmatics of locality as dress made of, in particular, cedar bark was much more effective in keeping an individual warm and dry. European clothing, on the other hand, was unsuitable for the wet climate of the region, and it has been suggested that the disappearance of cedar bark clothing accompanied an increased susceptibility for colds and aided in the spread of tuberculosis.<sup>122</sup>

Moreover, in addition to the proliferation of “New World” objects like kayaks, cultural pragmatics is not limited to Indigenous peoples. Staying amongst the Coast Salish, when missionaries arrived to the region they faced a dilemma of how to translate and convey the

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<sup>122</sup> See e.g. Marian W Smith, *The Puyallup-Nisqually* (New York: Columbia University Press, 1940) at 309.

literate tradition of Christianity to Indigenous peoples.<sup>123</sup> One strategy was the use of the pidgin Chinook jargon trade language to translate sermons and passages of the bible. Another was the development of a pictographic summary of key moments in the history of the Church and humans, and the explanation of central tenets of (initially) Catholic dogma known as the “Catholic Ladder.”<sup>124</sup> These are just a couple examples of how people of European descent also adapted their practices to enfold the contexts they found themselves in.

Even the Eurocentric Western legal tradition provides examples of cultural pragmatics. Relying on Thomas Kuhn’s notion of “paradigms” and his discussion of shifts or revolutions in them,<sup>125</sup> Berman draws a parallel between Western law and Western science, in that both presuppose that changes to their “givens” or to the existing conditions will occur.<sup>126</sup> Much like inflating a balloon, many of these changes can be assimilated into the existing paradigm or structure, and those that cannot are labelled as “anomalies.” Once the paradigm “balloon” becomes too full of these anomalies, it “bursts,” and requires “drastic change”: “In science, the old truth may have to give way to a new one. In law, the old justice may have to give way to a new one.”<sup>127</sup> Berman goes on to suggest that “the great revolutions of Western political, economic, and social history represents explosions that have occurred when the legal system proved too rigid to assimilate new conditions.”<sup>128</sup>

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<sup>123</sup> For an interesting discussion of this, see Albert Furtwangler, *Bringing Indians to the Book* (Seattle: University of Washington Press, 2005).

<sup>124</sup> Keith Thor Carlson, “Prophecy” in Keith Thor Carlson, ed, *A Stó:lō Coast Salish Historical Atlas* (Vancouver: Douglas & McIntyre, 2001) 154; Douglas Cole & David Darling, “History of the Early Period” in Wayne Suttles, ed, *Handbook of North American Indians*, vol 7 (Washington: Smithsonian Institution, 1990) 119 at 133. According to the Stó:lō ethnohistorian Keith Thor Carlson, these “Ladders” became a means of fighting between the various denominations of missionaries through their depictions of the other denominations and events. *The Power of Place, The Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism* (Toronto: University of Toronto Press, 2010) at 192.

<sup>125</sup> See Thomas S Kuhn, *The Structure of Scientific Revolutions*, 3d ed (Chicago: University of Chicago Press, 1996).

<sup>126</sup> Berman, *supra* note 71 at 22.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*



But are these “explosions” as radical as the word “revolution” implies? Perhaps not: as Berman himself acknowledges that these explosions—“which, to be sure, destroyed much of the past but also created a new future”—are “only one side of the story.”<sup>129</sup> The other side of the story seems to mitigate the “great release of energy” of the first side, as Berman suggests that the “great revolutions may be seen to have been not so much of a breakdown as a transformation,” adding that “it is hard to deny that current conditions are often determined to a significant degree by events that occurred even centuries earlier.”<sup>130</sup> As I will discuss in a subsequent chapter, we find the same sort of issue in Chief Justice Lamer’s attempt to avoid a “frozen right” approach in *Van der Peet* where he proffers the concept of dynamic continuity.<sup>131</sup> So while one side of Lamer’s “story” involves continuity with the pre-contact society that has been living in communities on the land, and participating in distinctive cultures, as they had done for centuries, the other side of his “story” is that this continuity is not necessarily “continuity” in a literal sense of being uninterrupted (particularly by Eurocentric colonialism, racism, and discrimination).<sup>132</sup> In other words, Lamer holds that there must be some continuity with a pre-existing society, but that the continuity is not, paradoxically, necessarily continuous.

Yet does not these two sides of the same story contradict themselves to a certain extent? Actually, I would argue that they do not. Instead, I would contend that they represent two perspectives on the same situation or event, for the most part, and highlight an instance of how the genealogical model of orthodox anthropology differs from cultural pragmatics of the relational approach in anthropology. The story with the legal “explosions” represent the

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<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid* at 22-23.

<sup>131</sup> *Supra* note 1 at para 64. Though in what follows, I will dispute how dynamic his concept, and that of the Court generally, is.

<sup>132</sup> *Ibid* at para 65.

perspective via the genealogical model where time is inverted<sup>133</sup> and the historiography is written backwards based on known “outcomes” to an antecedent event(s) or conditions, giving the resultant narrative a coherence that was not possible during the actual unfolding of events and lives. While this may give meaning to the events selected in writing or constructing the narrative, it also removes those events, and all others that were not selected, from the actual currents of life and relationships.

Cultural pragmatics and the relational approach, on the other hand, view life as just that: as ontogenetic development. What I mean by this is that life, humans, practices, traditions and cultures etc. *grow*. Thus, cultural pragmatics is a *way of life* that grows and develops as the circumstances of life continues to unfold. And as with ontogenetic development being the life-history of an organism, so too with practices, traditions and cultures.<sup>134</sup> For example, just like organisms, documents do not “speak for themselves”: the journals and other writings of European traders and explorers were not written with future Aboriginal rights claims in mind.<sup>135</sup> But, as part of a process of ontogenetic development (or cultural pragmatics), those documents have “grown” as they have enfolded new meanings and uses during the unfolding of time. Moreover, I would argue that ontogenetic development is what the Court attempted to encapsulate with their doctrine of logical evolution: like a plant growing from a seed to maturity, “[l]ogical evolution means the same sort of activity, carried on in the modern economy by modern means” responding to and enfolding changes in their unfolding contexts.<sup>136</sup> In other

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<sup>133</sup> In Part I of this thesis I discuss this “logic of inversion” in more depth.

<sup>134</sup> Tim Ingold, “Three in one: How an ecological approach can obviate the distinctions between body, mind and culture” in Andreas Roepstorff, Nils Bubandt & Kalevi Kull, eds, *Imagining Nature: Practices of Cosmology and Identity* (Aarhus: Aarhus University Press, 2003) 40 at 43 [Ingold, “Three in one”], “Beyond biology and culture: The meaning of evolution in a relational world” (2004) 12:2 *Social Anthropology* 209 at 216.

<sup>135</sup> See generally Adele Perry, “The Colonial Archive on Trial: Possession, Dispossession, and History in *Delgamuukw v. British Columbia*” in Antoinette Burton, ed, *Archive Stories: Facts, Fictions, and the Writing of History* (Durham, NC: Duke University Press, 2005) 325.

<sup>136</sup> *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 25.

words, again, the practices, traditions and cultures of distinctive Aboriginal societies that ground Aboriginal rights do not evolve in a process divorced from the lives of Aboriginal peoples, but *grow* as part of the processes of life through the enfolding and unfolding of new contexts, practices, humans and so on over time.<sup>137</sup>

And so, as we have seen a little above and will return to in what follows, there are, for the most part, no “explosions” but rather, to continue with Berman’s phrasing, transformations in which change and continuity co-mingle as life, events, other persons, and whatever else one engages with as they move about the world are enfolded and unfolded. Moreover, the view that the two sides contradict is only possible through the lens provided through the Eurocentric genealogical model and in its tendency to frame things in a dualistic or typological structure. Both “sides” are unproblematic from the relational approach, because it does not concentrate on superficial manifestations of change and continuity, but instead focuses on narratives of dwelling and cultural pragmatics that *grow* along with the society and people whom the narrative is about.

Furthermore, because they follow the movement of life, cultural pragmatics and the relational approach are not able to produce the coherent narratives in a manner like the genealogical model. Again coherence is produced by knowing the end of the story, which then allows one to select events that the author connects or attributes to the *dénouement*. My proposed trans-systemic framework outlined in the final chapter here is founded on (re-)placing life and Aboriginal rights back into the world, resulting in them being both viewed as undergoing continual growth and evolution. Such a view is also in accordance with Berman’s overall argument that legal systems (and even societies) *grow* and have an “*ongoing character*.”<sup>138</sup> Also

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<sup>137</sup> See generally Ingold, *Perception*, *supra* note 81 at 134-50.

<sup>138</sup> Berman, *supra* note 71 at 5-6 [emphasis in the original].

similar to Berman's discussion,<sup>139</sup> meaning, from the relational approach, is generated and regenerated, instead of ascribed, during people's involvement (or dwelling) in the world and the meshwork of relationships they find themselves in.<sup>140</sup>

Thus, while the relational approach and the genealogical model may at times seem similar, these similarities are only superficial. *This is very important to be mindful of in this thesis.* The differences may seem slight, but they are *very* significant. For example, while part of the focus of cultural pragmatics is on people's practical engagement during the processes of life lived in the world, *this should not be construed as being similar to the Court's reliance on activities and practices* in Aboriginal rights cases. The "practical engagement" of cultural pragmatics refers to, as mentioned, people's lives and dwelling—as unified beings—in the world along with its various inhabitants. The Court's reliance on activities and practices, in contrast, is a product of their Eurocentric ontology that separates nature from culture and mind from body, resulting in activities and practices being dispositionalized, essentialized, and inverted as "culture." As I will show in the following, the approach the courts take to Aboriginal rights is littered with contradictions and other problems of their own making. I will leave a more in-depth discussion of the implications of cultural pragmatics and the relational approach for jurisprudence and a trans-systemic legal framework to a later chapter, but, for now, the adoption of this approach, as we have seen, brings about a need to revise the Court's Eurocentric formulations of culture, society, continuity, and evolution (among others).

So let us now turn to the Court's approach to "culture."

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<sup>139</sup> "The concept of law as a particular kind of enterprise, in which rules play only a part, becomes meaningful in the context of the actual historical development of the living law of a given culture." *Ibid* at 5.

<sup>140</sup> See e.g. Ingold, "Three in one", *supra* note 134 at 53. See too James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006) at 158.

# *PART I*

## The Doctrine of Aboriginal Rights & the Lifelessness of “Culture”

# 2

## The Characterizing of “Culture” & Aboriginal Rights

In order to fulfil the purpose underlying s. 35(1) — i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions — the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

*per* Lamer C.J.<sup>1</sup>

In Part I of this thesis I explore the test for Aboriginal rights developed by the Court in *R. v. Van der Peet* to show, *contra* to Chief Justice Lamer’s assertion,<sup>2</sup> that the test does not meet the purposes of section 35(1) of the *Constitution Act, 1982*<sup>3</sup> and the doctrine of Aboriginal rights due to implicit, background biases. In this first chapter of Part I, I address the first phase of the *Van der Peet* test that focuses on the characterization of Aboriginal claimants’ ancestors. This phase is key as it is this pre-existence that not only grounds contemporary Aboriginal rights, but also distinguishes Aboriginal peoples from all other minority groups in Canadian society.<sup>4</sup> In the other chapters of Part I, I will turn to the phases of the test that focus on determining whether the pre-contact practice, custom or tradition that characterizes the Aboriginal right claim is, first, integral and distinctive, and, second, how it translates into a contemporary right. In each chapter of this part, I highlight the background assumptions and biases of the Court and how they serve to restrict and deny claims to Aboriginal rights.

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<sup>1</sup> *R v Van der Peet*, [1996] 2 SCR 507 at para 44 [*Van der Peet* (SCC)].

<sup>2</sup> *Ibid* at para 19.

<sup>3</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>4</sup> *Van der Peet* (SCC), *supra* note 1 at para 30.

Founding Aboriginal rights in the pre-contact cultures and societies of Aboriginal peoples causes many problems, and the Court's approach to determining whether a practice, custom and/or tradition pre-existed European contact highlights many of their implicit biases and assumptions. While I will discuss the issue of European influence in a later chapter, the first issue with the Court's approach in this first phase of the test is that *all* written records are post-contact, and, as a result, can only speculate as to what pre-contact "culture" was like. Moreover, the vast majority of the written record was produced by outsiders who relied upon the categories and beliefs of Eurocentric ontology and epistemology—similar to the Court's importation of Eurocentric social science categories into the doctrine of Aboriginal rights discussed in chapter 1.

In this chapter then, I will examine the implicit, background assumptions of the Court in their approach to the lives of Aboriginal claimants' ancestors that structures the Court's adjudication of claims to Aboriginal rights. To do so I will first explore the conception of personhood and atomism that the Court's approach is based on, which leads into the reasons why the Court focuses on practices, customs or traditions and the implications of this. By atomizing culture into discrete elements, this then allows the construction and use of categories and taxonomies (and to what I call "categorical thought") which is the focus of the final section of this chapter. As a way into these topics, let us return to the Court's use of the concepts of "society" and "culture."

Highlighting the problems raised in chapter 1, we can see in the passage from *Van der Peet* quoted in the epigraph to this chapter that, on the one hand, the test for identifying Aboriginal rights is directed at "pre-existing distinctive societies," while, in a subsequent paragraph, Lamer C.J. writes that to establish an Aboriginal right, an activity must be integral to

the claimant's ancestors' "distinctive culture."<sup>5</sup> And while the Court has not always been consistent, it appears that they conceive the concept of "society" as being comprised of "cultures":

The suggestion of this passage is that participation in the salmon fishery is an aboriginal right because it is an "integral part" of the "distinctive culture" of the Musqueam. This suggestion is consistent with the position just adopted; identifying those practices, customs and traditions that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.<sup>6</sup>

Although providing no further insight into what the Court means by "society" (or "societies"), the lack of clarity Lamer created in *Van der Peet* causes confusion: if reconciliation is said to occur between pre-existing Aboriginal societies with the sovereignty of the Crown, it follows that in a particular Aboriginal rights claim that the focus is on a specific Aboriginal society, but if that society is composed of multiple cultures which "culture" is the Court supposed to look at? For example, in *Ahousaht Indian Band v. Canada (AG)*<sup>7</sup> the claim to an Aboriginal right was made by the Ehattesaht, Mowachaht/Muchalaht, Hequiaht, Ahousaht, and Tla-o-qui-aht bands.<sup>8</sup> So which "culture" should the Court focus on in this claim? As at times it appears that the pre-contact Nuu-chah-nulth society only has a single "culture,"<sup>9</sup> while at other times it has multiple "cultures."<sup>10</sup> Furthermore, six of the original eleven plaintiffs in this action withdrew from the

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<sup>5</sup> *Ibid* at para 46.

<sup>6</sup> *Ibid* at para 45.

<sup>7</sup> [2010] 1 CNLR 1 [*Ahousaht*].

<sup>8</sup> *Ahousaht* is a bit confusing on the number of plaintiffs and their identities: Justice Garson states that those listed are the plaintiffs in this case (e.g. at para 1), though there are eight plaintiffs listed in the style of cause, while the Huu-ay-aht, another Nuu-chah-nulth people, are discussed and two members of the Huu-ay-aht gave evidence, they are not listed in the style of cause, and, finally, at para 720 Garson states that there are *six* plaintiffs.

<sup>9</sup> In laying out how she has modified the analytical framework of *Van der Peet*, Justice Garson writes, "Next I will determine whether any such practices were integral to the distinctive *culture* of pre-contact Nuu-chah-nulth society." *Ibid* at para 54 [emphasis added].

<sup>10</sup> "I am also satisfied that fishing and trading in fisheries resources were practices that were integral to the distinctive *cultures* of pre-contact Nuu-chah-nulth society." *Ibid* at para 440 [emphasis added].



current proceedings;<sup>11</sup> and while Justice Garson states that she will refer to the five plaintiffs collectively as “the Nuu-chah-nulth” or “the Nuu-chah-nulth people”<sup>12</sup> surely this can still not translate to the “Nuu-chah-nulth society” that the reconciliatory purposes of s. 35(1) is directed towards. We see the same issue in *R. v. Sappier*; *R. v. Gray* where Justice Bastarache uses “culture” in the singular when discussing “Aboriginal society” (as well as “community”) in discussing reconciliation: “The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community.”<sup>13</sup>

To add further confusion and sloppiness to the Court’s approach to Aboriginal rights, Lamer C.J. suggests, as seen in the epigraph to chapter 1, that the pre-existing Aboriginal societies are comprised of “practices, traditions and cultures,”<sup>14</sup> while, at the same time, holding that it are traditions or customs that make the culture “what it is.”<sup>15</sup> The only consistent association the Court seems to make with “culture” then are customs. We find support for this in *Van der Peet* where the exchange of salmon is framed as a custom (and not as a practice or tradition): “Scarlett Prov. Ct. J. found that, prior to contact, exchanges of fish were only ‘incidental’ to fishing for food purposes. As was noted above, to constitute an aboriginal right, a custom must itself be integral to the distinctive culture of the aboriginal community in question; it cannot be simply incidental to an integral custom.”<sup>16</sup> Yet even the culture–custom equation/association falls apart, as in his justification for the “pre-existing societies” basis of

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<sup>11</sup> *Ibid* at para 3. Though the original eleven plaintiffs still do not comprise all the groups represented by the Nuuchahnulth Tribal Council (see e.g. Nuuchahnulth Tribal Council, online: Nuuchahnulth Tribal Council, Welcome <<http://www.nuuchahnulth.org/tribal-council/welcome.html>>).

<sup>12</sup> *Ahousaht*, *supra* note 7 at para 3.

<sup>13</sup> [2006] 2 SCR 686 at para 22 [*Sappier*].

<sup>14</sup> *Van der Peet* (SCC), *supra* note 1 at para 31.

<sup>15</sup> *Ibid* at para 71.

<sup>16</sup> *Ibid* at para 86.

Aboriginal rights, Lamer distinguishes culture and custom (while, at the same time, defining “tradition” in the same paragraph in a way that transforms it into something that is incompatible with its use in “practices, customs and/or traditions”): “‘Traditional laws’ and ‘traditional customs’ are those things passed down, and arising, from the pre-existing *culture and customs* of aboriginal peoples.”<sup>17</sup> On the one hand, then, “culture” is composed of practices, customs and traditions, and on the other, practices, customs and traditions are distinct from a people’s “culture.” Yet as we shall see below, this reflects the duality of the Eurocentric conception of “culture” where, on the one hand, it refers to a body of information, rules, etc, while, on the other, it refers to differences in the way collectivities of people live.

This paradox also highlights a tension in Eurocentric thought between the individual and society/culture, as the individual is considered to be the “atom” of (yet prior to) society and culture.<sup>18</sup> At the same time, atomism pervades the view of culture in the sense of it being composed of practices, customs and traditions as Justice L’Heureux-Dubé’s criticism of the Chief Justice’s test illustrates: “The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted.”<sup>19</sup> Before we can delve further into the atomism of the Court’s approach to Aboriginal rights, we must first turn to the Eurocentric conception of personhood that underlies it.

## **I. Understanding the Human & the Person**

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<sup>17</sup> *Ibid* at para 40 [emphasis added]. By suggesting that Lamer’s definition of tradition is “incompatible” with its use in “practices, customs and/or traditions” what I mean is that by defining “tradition” as “that which is ‘handed down [from ancestors] to posterity’” (*ibid* [alteration in original]), “tradition,” in this sense, is a process of transmission in and over time—and *not* an activity in the world. I will discuss this all more later, but this definition resonates with, as I discussed in chapter 1, the genealogical model’s conception of culture which divorces it from peoples’ lives in the world.

<sup>18</sup> Deborah Gordon, “Tenacious Assumptions in Western Medicine” in Margaret Lock & Deborah Gordon, eds, *Biomedicine Examined* (London: Kluwer Academic Publishers, 1988) 19 at 34.

<sup>19</sup> *Van der Peet* (SCC), *supra* note 1 at para 150.

In chapter 1 I introduced the genealogical model that predominates in orthodox anthropology and how it formulates “culture” as bounded, discrete, and homogenous that is not only distinct from, but also following, a prior world or realm of “nature.” This is the “nature” of science that is considered to be an independent, empirical reality that various cultures “construct” differing depictions of rather than constituting it.<sup>20</sup> One implication of this Cartesian opposition of nature with culture is that human existence in Eurocentric thought is arbitrarily divided into the “natural,” that is taken to be universal, and the “cultural” that is particular and where diversity and distinctiveness appear.<sup>21</sup> As a result, the human person becomes viewed in Eurocentric thought as being “animal plus”: on the one hand, the human person is considered to be an individual of the species *Homo sapiens*, much like an individual chipmunk is to *Tamias lysteri*, while, on the other, the human species is considered to differ from all other animal species through an added, “plus” factor of “culture.”<sup>22</sup> So while the “natural” or biological part of the human being is considered universal, the “cultural” part of the human is particular and idiosyncratic.

Thus, while seemingly only superficial,<sup>23</sup> the locus of human distinctiveness is believed to reside in that part of the human being that *exceeds* the organism: the “person.” Persons, then, are considered to be formed within culture, and organisms within nature. This in turn transfers,

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<sup>20</sup> Gordon, *supra* note 18 at 27.

<sup>21</sup> *Ibid.* This divided existence is in the sense of human’s existence as animals or biological beings in a world of nature and our existence as social beings that interact with other humans in a world of culture or society. While this distinction is quite similar to that between natural and artificial, there are some differences. For example, the distinctions are similar in the contexts of health, ill-health, and biomedical interventions—particularly at the end of life where, as discussed in *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 [*Rodriguez*]: there is “natural” death versus “artificial” death that results from biomedical intervention in the form of physician-assisted suicide; or with “natural remission” (becoming well without biomedical intervention) versus pharmacological treatment. Furthermore, the idea that culture can be “naturalized” is not only based on this separation of nature and culture, but also is a product of the “culturalization” of the perceived environment. Tim Ingold, *The Perception of the Environment: Essays in livelihood, dwelling and skill* (London: Routledge, 2000) at 59 [Ingold, *Perception*].

<sup>22</sup> Gordon, *supra* note 18 at 27; Tim Ingold, “Becoming Persons: Consciousness and Sociality in Human Evolution” (1991) 4:3 *Cultural Dynamics* 355 at 356-58 [Ingold, “Becoming Persons”].

<sup>23</sup> Gordon, *supra* note 18 at 27.

according to anthropologist Tim Ingold, “all qualitative distinction onto the boundary between culture and nature, [and] differences within nature are reduced to those of degree.”<sup>24</sup> While this may appear to some as overturning “the absolute boundary that separates ‘us’ from other creatures,” Ingold argues that this is, instead, “merely to draw it in a different place.”<sup>25</sup>

The Eurocentric conception of “culture,” then, creates a first “Great Divide” that separates human from non-human, defining the properties, relations and the abilities of each.<sup>26</sup> This Great Divide is accomplished through the ascendancy given to rationality in Eurocentric thought where “Culture” is seen as a universal quality (or a single body of information) of the human species—and is synonymous with the nineteenth century evolutionary idea of “civilization.”<sup>27</sup> Scientific thought was key in this development, as through it “nature” was defined and, importantly, was defined as something ahuman, that has always existed and is not of humanity’s creation.<sup>28</sup> Science supposedly then produces an objective account of nature through the belief in the disengagement produced through *human* reason (thereby reinforcing the human/non-human division).<sup>29</sup> By “bracketing off” nature, the notion of “culture” was created.<sup>30</sup>

But as this Great Divide separated humans from a non-human nature, a second Great Divide was produced. By defining culture as “Culture” (a single body of information), nineteenth century theorists were then faced with the problem of explaining the differences observed in the lives of various groups of humans. By holding Eurocentric “culture” as the pinnacle of

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<sup>24</sup> Ingold, “Becoming Persons”, *supra* note 22 at 357.

<sup>25</sup> *Ibid.*

<sup>26</sup> Bruno Latour, *We Have Never Been Modern* (Cambridge, MA: Harvard University Press, 1993) at 15.

<sup>27</sup> Sir Edward B Tylor, *Primitive Culture: Researches Into the Development of Mythology, Philosophy, Religion, Art & Custom* (London: John Murray, 1871) at 1; Tim Ingold, “The Art of Translation in a Continuous World” in Gísli Pálsson, ed, *Beyond Boundaries: Understanding, Translation, and Anthropological Discourse* (Oxford: Berg, 1993) 210 at 212 [Ingold, “Art of Translation”].

<sup>28</sup> Latour, *supra* note 26 at 30.

<sup>29</sup> Ingold, *Perception*, *supra* note 21 at 14-15, “Comment: Human nature and science” (1999) 24 *Interdisciplinary Science Reviews* 250 at 250 [Ingold, “Human nature”]; Latour, *supra* note 26 at 28. This use of rationality to distinguish humans from non-humans is similar to what distinguished humans from “lower” living things in the Great Chain of Being. See too in Thomas Hobbes, *Leviathan* (New York: Penguin Books, 1968) at 226.

<sup>30</sup> Latour, *supra* note 26 at 104.

progressive cultural evolution, due to the belief of it being the fullest development of, or superior, rationality (manifested in science),<sup>31</sup> another Great Divide was created between “Us” and “Them” based on the opposition of the modern/civilized on one side and the traditional/primitive on the other.<sup>32</sup> The sense of culture as a distinct property of the human species is transformed from an internal, universal capacity to a condition or state (“civilized”/“cultured”) that creates an external Great Divide distinguishing “Us” from “Them.”<sup>33</sup>

As with the first Great Divide, “nature” and science also play a role in creating this second, external partition. First, the sense of “Culture” as the human capacity of rationality arose through a metaphorical extension of earlier meanings of the word: “From [early sixteenth century] the tending of natural growth was extended to a process of human development.”<sup>34</sup> Thus, this use of “Culture” was derived from the process of tending domesticated plants and animals, and, as a result, this usage also refers to the rational domination of nature.<sup>35</sup> With this second Divide’s founding on the first, practices like agriculture became markers of “civilization” (and therefore, as I will discuss further below, more “evolved”),<sup>36</sup> as agriculturalists were not

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<sup>31</sup> See e.g. JM Blaut, *Eight Eurocentric Historians* (New York & London: The Guilford Press, 2000) at 7.

<sup>32</sup> See e.g. Ingold, “Art of Translation”, *supra* note 27 at 214; Nigel Rapport & Joanna Overing, *Social and Cultural Anthropology: The Key Concepts*, 2d ed (London: Routledge, 2007) at 116.

<sup>33</sup> See e.g. Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, revised ed (New York: Oxford University Press, 1983) at 59; Latour, *supra* note 26 at 99-100.

<sup>34</sup> Williams, *supra* note 33 at 87.

<sup>35</sup> See e.g. Ingold, “Human nature”, *supra* note 29 at 250.

<sup>36</sup> For example, Karl Marx and Friedrich Engels assert that humans “begin to distinguish themselves from animals as soon as they begin to *produce* their means of subsistence.” *The German Ideology: Parts I & III*, ed by R Pascal (New York: International Publishers, 1947) at 7 [emphasis in original]; see too Hobbes, *supra* note 29 at 186. While some may include hunting, fishing and gathering in this use of production, Marx and Engels later refer to these modes of production as an “undeveloped stage of production,” while holding agriculture as the “highest stage.” Marx & Engels, *supra* note 36 at 9.

reliant on the “vagaries” of nature and so agricultural training became part of the colonial project of “civilizing” Aboriginal peoples.<sup>37</sup>

Second, that “nature” is seen as a human and distinct is not a universal conception.<sup>38</sup> Yet although this distinct “nature” is a construct of Eurocentrism, it is, again, believed to be an “objective” reality “out there” that is accessible through scientific techniques and methods—“nature” is literally naturalized. Similar then to the first Divide, by not distinguishing nature from culture, this places “Them”—non-Eurocentric *cultures*—in opposition to “Us”: “We Westerners cannot be one culture among others, since we also mobilize Nature. We do not mobilize an image or a symbolic representation of Nature, the way the other societies do, but Nature as it is, or at least as it is known to the sciences.”<sup>39</sup> This is manifested in an academic division of labour where, for example, the scientist goes out into the field to study organic nature “as it really is” while an anthropologist will study the culturally constructed or “cognized” worlds of the people they are studying.<sup>40</sup> Similarly I mentioned in chapter 1 how nineteenth century positivists translated cultural difference into legal difference. With the gap constructed between the civilized European and the uncivilized non-European and the association of international law with science,<sup>41</sup> this too bolstered the belief in Eurocentric superiority and the need to “civilize” those lacking their Victorian ideals.<sup>42</sup>

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<sup>37</sup> See e.g. Hugh Brody, *The Other Side of Eden: Hunter-Gathers, Farmers and the Shaping of the World* (London: Faber and Faber, 2001) at 120.

<sup>38</sup> See e.g. Signe Howell, “Nature in culture or culture in nature?: Chewong ideas of ‘humans’ and other species” in Philippe Descola & Gísli Pálsson, eds, *Nature and Society: Anthropological Perspectives* (London: Routledge, 1996) 127; Philippe Descola, “Constructing natures: symbolic ecology and social practice” in Philippe Descola & Gísli Pálsson, eds, *Nature and Society: Anthropological Perspectives* (London: Routledge, 1996) 82.

<sup>39</sup> Latour, *supra* note 26 at 97.

<sup>40</sup> Ingold, *Perception*, *supra* note 21 at 13; see too Latour, *supra* note 26 at 101-02.

<sup>41</sup> Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 Harv Int’l LJ 1 at 18.

<sup>42</sup> *Ibid* at 5, 72.

Further, the resulting distinction of a singular Culture from a plural cultures produced through the construction (the first Great Divide) and mobilization (the second Great Divide) of “nature,” also results in an opposition between rationality and tradition. While I will discuss some of this further below, this latter opposition also creates a further opposition between “Us” and “Them” based on a temporal sequence where “Aboriginal” and/or tradition is considered to be chronologically first.<sup>43</sup> Thus, nineteenth century positivists could study the colonies in developing the discipline of international law through an evolutionary belief that the “uncivilized” represented an earlier stage in the history or evolution of the “civilized.”<sup>44</sup> The “pastness” of Aboriginal and tradition is also apparent in the way Lamer C.J. used a dictionary definition to justify the founding of Aboriginal rights in the “pre-existing societies of aboriginal peoples.”<sup>45</sup>

Finally, to avoid placing the continuity of cultures (between Eurocentric and non-Eurocentric) in a progressive series, the two Great Divides force contemporary Eurocentric scholars to bring Aboriginal peoples in particular as close as possible to the sciences.<sup>46</sup> For example, the structural anthropologist Claude Lévi-Strauss asserted that “primitive” thought and Eurocentric thought were more of a difference in degree than kind due to what he called “mistakes of identification” on the part of the “primitives”: “But, without perfected instruments which would have permitted *them* to place [the sensible properties of the animal and plant kingdoms] where it most often is – namely, at the microscopic level – *they* already discerned ‘as through a glass darkly’ principles of interpretation whose heuristic value and accordance with reality have been revealed to *us* only through very recent inventions: telecommunications,

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<sup>43</sup> Alan Barnard, “Culture: the Indigenous Account” in Deborah James, Evie Plaice & Christina Toren, eds, *Culture Wars: Context, Models and Anthropologists’ Accounts* (New York: Berghahn Books, 2010) 73 at 77.

<sup>44</sup> Anghie, *supra* note 41 at 71-72.

<sup>45</sup> See discussion accompanying note 17.

<sup>46</sup> Latour, *supra* note 26 at 97.

computers and electron microscopes.”<sup>47</sup> In short, as sociologist of science Bruno Latour sums it up: “Give the primitives a microscope, and they will think exactly as we do.”<sup>48</sup> Thus, while not all humans are scientists, the Great Divides conspire so that all humans are believed to have the *capacity* to be scientists that is based on “the liberation of reason from the compulsions of nature, or of intelligence from instinct.”<sup>49</sup> On the one hand, then, the Great Divides bring the “primitive,” and mistaken “Them” closer to the “modern,” scientific “Us” by attributing to them an unrealized capacity for scientific rationality that is held to distinguish humans from non-humans,<sup>50</sup> only to, on the other hand (or at the same time), push “Them” away based on their “distance” from scientific thought due to their “mistakes of identification.”<sup>51</sup>

Highlighting the naturalization of “Culture” and the culturalization of “nature” produced by the two Great Divides more explicitly returns us to the Eurocentric conception of personhood. As a result of the association/role of rationality in the first, internal Divide, the plurality of cultures produced by the second, external Divide remains a mental phenomenon. This is manifested in, as discussed in chapter 1, how the Cartesian dualism can refer to either the distinction between nature and culture *or* between body and mind from which the Eurocentric “animal plus” conception of the human person arises. One implication of these Divides is that “culture” necessarily becomes bounded and discrete (it is literally confined to the skin or skull) due to its opposition with “nature.” This, then, divides human existence in two as alluded to above where, on the one hand, people interact as biological beings in a world of “nature” and, on

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<sup>47</sup> Claude Lévi-Strauss, *The Savage Mind* (Chicago: University of Chicago Press, 1966) at 268 [emphasis added]. Note in this quote examples of the association of science (and technology) with reality “as it is,” as well as in the opposition between “Us” and “Them.”

<sup>48</sup> *Supra* note 26 at 98.

<sup>49</sup> Ingold, “Human nature”, *supra* note 29 at 250.

<sup>50</sup> “The entire process of human knowledge thus assumes the character of a closed system. And we therefore remain faithful to the inspiration of the savage mind when we recognize that ... the scientific spirit in its most modern form will have contributed to legitimize the principles of savage thought and to re-establish it in its rightful place.” Lévi-Strauss, *supra* note 47 at 269.

<sup>51</sup> Latour, *supra* note 26 at 98; Ingold, *Perception*, *supra* note 21 at 15, “Human nature”, *supra* note 29 at 252.



the other, where people interact with other humans in a “cultural” sphere.<sup>52</sup> In this formulation, “nature” is not only an independent, empirical reality, it is prior to “culture.”<sup>53</sup> As a result, “nature,” for the non-scientist, becomes culturally constructed via symbols, language or other representations that depict it instead of constituting it.<sup>54</sup>

As alluded to in chapter 1, this dual nature of the human person in the genealogical model also means that the formation or development of an individual results from a parallel process of biological and cultural transmission. The former transmission (formulated as genetic inheritance) arises through the first Great Divide and guarantees that the genetic offspring of human parents will also be a human being—regardless of the contexts of their life in the world.<sup>55</sup> The latter transmission, arising through the second Divide, closes the “information gap,” as the anthropologist Clifford Geertz once phrased it, “[b]etween what our body tells us and what we have to know in order to function.”<sup>56</sup> Highlighting the parallel transmissions, Geertz continues that this gap is something humans “must fill ourselves, and we fill it with information (or misinformation) provided by our culture.”<sup>57</sup> Thus “culture” becomes framed as “what one needs to know in order to behave as a functioning member of one’s society.”<sup>58</sup> Again, the animal plus conception results in a universal, biological being that is particularized by the transmission of

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<sup>52</sup> Tim Ingold, “From complementarity to obviation: on dissolving the boundaries between social and biological anthropology, archaeology and psychology” (1998) 123 *Zeitschrift für Ethnologie* 21.

<sup>53</sup> Gordon, *supra* note 18 at 27.

<sup>54</sup> *Ibid.*

<sup>55</sup> Tim Ingold, “Two Reflections on Ecological Knowledge” in Glauco Sanga & Gherardo Ortalli, eds, *Nature Knowledge: Ethnoscience, Cognition, and Utility* (New York: Berghahn Books, 2004) 301 at 301 [Ingold, “Two Reflections”].

<sup>56</sup> Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973) at 50; Ingold, “Two Reflections”, *supra* note 55 at 301.

<sup>57</sup> Geertz, *supra* note 56 at 50.

<sup>58</sup> This framing of culture is a paraphrasing of linguistic and cognitive anthropologist Ward Goodenough’s influential definition (“Cultural Anthropology and Linguistics” in Paul L Garvin, ed, *Report of the Seventh Annual Round Table Meeting on Linguistics and Language Study, University of Georgetown Monograph Series on Languages and Linguistics, No 9* (Washington: Georgetown University Press, 1957) 167 at 167) by psychological anthropologists Naomi Quinn & Dorothy Holland. “Culture and cognition” in Dorothy Holland & Naomi Quinn, eds, *Cultural models in language and thought* (Cambridge: Cambridge University Press, 1987) 3 at 4. See too Ingold, *Perception*, *supra* note 21 at 426.

elements of intergenerationally transmissible information, rules or knowledge: “we all begin with the natural equipment to live a thousand kinds of life but in the end having lived only one.”<sup>59</sup>

Once more we find another resemblance to Chief Justice Lamer’s definition of tradition in which “tradition” is something transmitted (or handed down) alongside the transmission of biological continuity: “The very meaning of the word ‘tradition’ — that which is ‘handed down [from ancestors] to posterity’.”<sup>60</sup>

A further consequence or manifestation of the dual existence of the animal plus human person for Aboriginal rights involves the issue of activities undertaken for survival purposes. By separating interactions between human people and their “practical–technical interaction with environmental resources in the context of subsistence activities,”<sup>61</sup> this conception of the human person resulted in the Court suggesting, prior to *Sappier*, that activities undertaken for survival purposes in particular could not be recognized and affirmed as an Aboriginal right. This was due to, following *Van der Peet*, only those practices, customs and traditions that made the culture “what it is” were to be protected.<sup>62</sup> The test developed in *Van der Peet* resulted in denying recognition to “those aspects of the aboriginal society that are true of every human society (e.g., eating to survive).”<sup>63</sup> Commonalities in human societies in this sense are known in anthropology (at least) as “cultural universals.”<sup>64</sup> Such universals are based on the idea that as animals all humans have basic, biological needs that need to be satisfied and so, the anthropological reasoning goes, there are particular elements of “culture” that are said to exist in all human

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<sup>59</sup> Geertz, *supra* note 56 at 45.

<sup>60</sup> *Van der Peet* (SCC), *supra* note 1 at para 40 [alteration in original].

<sup>61</sup> Ingold, *Perception*, *supra* note 21 at 56.

<sup>62</sup> *Van der Peet* (SCC), *supra* note 1 at para 71.

<sup>63</sup> *Ibid* at para 56.

<sup>64</sup> In anthropology I do not think I have ever come across any references to “social” or “societal” universals. I will discuss the relationship between “society” and “culture” more below.

societies.<sup>65</sup> As the Court implies, then, all humans need to eat to survive or need to construct shelter, therefore neither of these desires or needs make a *particular* people distinctive.<sup>66</sup>

Moreover, by viewing sustenance as a need-satisfying, biological process, this serves to remove the activities involved in procuring subsistence from the sphere of social action (among/between human individuals) thereby making subsistence activities *non-social*.<sup>67</sup> For example, in establishing that activities undertaken for survival purposes can qualify for s. 35(1) protection, Justice Bastarache wrote, “I wish to clarify, however, that there is no such thing as an aboriginal right to sustenance. Rather, these cases stand for the proposition that the traditional *means* of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular aboriginal people.”<sup>68</sup> Thus, according to the underlying Eurocentric logic, because subsistence is considered a process to satisfy needs, when Aboriginal peoples acquire food by hunting, gathering or fishing they can only do so, even when working cooperatively, in their “natural” capacity as individuals.<sup>69</sup> It follows, then, that the process of satisfying the need to eat (extracting resources from nature) cannot qualify as an Aboriginal right because the need for sustenance is biological and *not* cultural. Therefore, Aboriginal rights become restricted as producing and consuming food are individual acts of an organism–person, that cannot qualify as an Aboriginal right, while the cultural practices that have been transmitted to the individual to “close the gap” may: “Some

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<sup>65</sup> See e.g. James Peoples & Garrick Bailey, *Humanity: An Introduction to Cultural Anthropology*, 7th ed (Belmont CA: Thomson Higher Education, 2006) at 37-38; Bronislaw Malinowski, *A Scientific Theory of Culture and other essays* (Chapel Hill: University of North Carolina Press, 1944) at 72-73, “The Group and the Individual in Functional Analysis” (1939) 44 *American Journal of Sociology* 938 at 940-41.

<sup>66</sup> The need to construct shelter example comes from Justice Bastarache’s discussion of whether practices undertaken for survival purposes can be considered “integral” to a culture. Bastarache states that this was the “principal issue on appeal” as the trial judge, following the passage quoted above from *Van der Peet*, ruled that “[a]ny humane society who would have been living on the same lands in New Brunswick at the same time would have used wood and wood products for the same purposes.” *Sappier*, *supra* note 13 at paras 35-36.

<sup>67</sup> Ingold, *Perception*, *supra* note 21 at 318.

<sup>68</sup> *Sappier*, *supra* note 13 at para 37 [emphasis in original].

<sup>69</sup> Ingold, *Perception*, *supra* note 21 at 318.

things are, for all intents and purposes, entirely controlled intrinsically: we need no more cultural guidance to learn how to breathe than a fish needs to learn how to swim. Others are almost certainly largely cultural.”<sup>70</sup> Betraying the fallaciousness of the first Great Divide (therefore bringing into question the second Divide as well), Geertz adds that “[a]lmost all complex human behavior is, of course, the interactive, nonadditive outcome of the two. Our capacity to speak is surely innate; our capacity to speak English is surely cultural.”<sup>71</sup> Similar then to the supposed disengagement achieved in science, what we find in this aspect of *Sappier* is a separation of epistemology from ontology, being from knowing.<sup>72</sup> Thus, “traditional means of sustenance” is part of the body of knowledge that is transmitted, independently from the circumstances of their actual life, to the individual as a member of a particular culture that is separate from the need to eat to survive which is part of the individual’s existence as a biological organism.

Furthermore, if “culture” is what one “needs to know” to function within a group, reality becomes fragmented as relations and processes are dislodged from the world in which people live, and are re-ascribed to and reconstituted on an abstract or metaphysical plane of thought and representations, leaving the individual as a residual, self-contained isolate.<sup>73</sup> Reality becomes fragmented due to “culture” being thought of as composed of rules, schemas, recipes or other discrete elements. Each rule etc. then deals with a particular topic or aspect of life, similar in a way to subject card library catalogues in the past: you have a particular “drawer” or “card” for a topic instead of a holistic meshwork. Thus, “when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in

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<sup>70</sup> Geertz, *supra* note 56 at 50.

<sup>71</sup> *Ibid.*

<sup>72</sup> See e.g. Gordon, *supra* note 18 at 32.

<sup>73</sup> Tim Ingold, “Editorial” (1992) 27 *Man* 693 at 695.

distinctive cultures,”<sup>74</sup> the two Great Divides separate Aboriginal peoples from both the world (“nature”) that they live in communities *on* as well as the distinctive culture in which they participate *in*. “Culture,” so formulated, operates as an extrasomatic, “superorganic,” metaphysical force outside and beyond human agency reinforcing a necessarily static and bounded conception—it is something isolatable: “*a culture*.”<sup>75</sup>

This conception of personhood, “culture” and “nature” grounds Eurocentric thought (including the genealogical model in anthropology). And because of the naturalization of Eurocentric thought, these conceptions create biases when attempting to understand peoples from other “cultures.” As a result, the topics discussed so far will be returned to continually throughout what follows, not only to further develop this discussion, but also to highlight how the Eurocentric conception of personhood permeates the doctrine of Aboriginal rights. One final consequence of the conception of “culture” as bounded and static that I will mention leads us back to atomism. This formulation results in “culture” being not only reified but essentialized as well,<sup>76</sup> as it becomes thought of as a collectivity of individuals,<sup>77</sup> which, in turn, become a part (“atom”) that is representative of an essentialized cultural whole.

## **II. The Paradox of Life**

As I have been discussing, by portraying “culture” as an objective reality over and beyond human agency, it is assumed to have an “ontological realism” where it is understood “as

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<sup>74</sup> *Van der Peet* (SCC), *supra* note 1 at para 30 [underlining in original].

<sup>75</sup> James Sákéj Youngblood Henderson has made a similar point that also touches on other topics discussed in this section regarding the founding of legal theories on the idea of “culture”: “very few legal theories are based solely on the foundation of a single ‘culture.’ The inherent problem is that culture is often naturalized as stable, coherent, and common despite claims about culture’s contradictoriness.” James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006) at 104 [Henderson, *First Nations Jurisprudence*].

<sup>76</sup> See e.g. Roger M Keesing, “Theories of Culture Revisited” in Robert Borofsky, ed, *Assessing Cultural Anthropology* (New York: McGraw-Hill, 1994) 301 at 302.

<sup>77</sup> *Ibid.*

something real, to be found *outside* the minds of individuals and objectified in the form of a collection of objects, symbols, techniques, values, beliefs, practices and institutions that the individuals of a culture share.”<sup>78</sup> By making “a culture” thing-like, “it” becomes a countable unit,<sup>79</sup> and if “culture” is a collection of smaller parts or atoms, they too can be isolated, described and counted. Nowhere in anthropology is this view of “culture” more prominent than in the culture element distribution ethnographic method.<sup>80</sup> Briefly, this was a fieldwork method that involved the ethnographer asking Indigenous informants about the presence or absence of a fairly standardized list of cultural items or elements.<sup>81</sup> Thus, in the culture element distribution list for the Northwest Coast region,<sup>82</sup> if one of the seventeen groups surveyed had a trait present a “+” was put in the column for that group, likewise a “-” for traits not present, a “(+)” or “(-)” if the presence (or absence) of the trait was uncertain, as well as other symbols to denote other responses to the presence or absence of a trait.<sup>83</sup> Important for our concerns is that in creating these element lists the first condition for identifying units is that “the elements must be *sharply definable*,” because this “definable differentiation” “is the equivalent of measurability in other types of material.”<sup>84</sup> As a result, “culture” can literally be broken up into a collection of distinct practices, customs and traditions which are treated as material artifacts—or even like

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<sup>78</sup> Rapport & Overing, *supra* note 32 at 12 [emphasis in original].

<sup>79</sup> Keesing, *supra* note 76 at 303; Barnard, *supra* note 43 at 75.

<sup>80</sup> See e.g. AL Kroeber, “Preface” in Stanislaus Klimek, “Culture Element Distributions I: The Structure of California Indian Culture” (1935) 37:1 University of California Publications in American Archaeology and Ethnology 1.

<sup>81</sup> *Ibid* at 9-10.

<sup>82</sup> While for the most part the element list was standardized, in each region it was used the list was adapted to the local circumstances. So while the original (or basic) element list included around five hundred elements (see *ibid*), the culture element list for the Northwest Coast included over 1800 elements. Examples of what was included are: tidewater salmon traps, root digging by women, eyebrows trimmed (plucked), descriptive moon count, autonomous local groups, territorial rights owned (all groups surveyed are listed as having this element), first fish ritual, and trade blankets and skins as wealth. Philip Drucker, “Culture Element Distributions XXVI: Northwest Coast” (1950) 9:3 Anthropological Records 157.

<sup>83</sup> *Ibid* at 166.

<sup>84</sup> Kroeber, *supra* note 80 at 1 [emphasis added].

possessions. Moreover, it was suggested that by creating these element lists this would allow *comparison* across “cultures” and regions.<sup>85</sup>

By objectifying “culture” through the separation of ontology from epistemology and the atomism of Eurocentric thought, it then becomes possible to look at (dispositionalize<sup>86</sup>) material/visible manifestations as representing the mental aspects of “culture.” For example, in summing up the test he developed, Lamer C.J. wrote, “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>87</sup> So while “culture” is an abstraction created through the Great Divides, instead of looking at actual individuals and their lives, the Court takes activities, practices, customs and traditions as representative of a larger category of “culture” and, therefore, those deemed to be integral by the Court can qualify as Aboriginal rights.

And because “culture” is thought of as a collection of information, rules, schemata etc., they too become objectified as “things-in-themselves” which, as with the dual existence of the Eurocentric human person, dislodges relations and processes from the world in which people live. It is this reasoning that led Russel Barsh and Sákéj Henderson to criticize the Supreme Court of Canada (SCC) for viewing “culture” as “a fixed inventory of traits or characteristics” in the *Van der Peet* ruling,<sup>88</sup> and Chilwen Cheng to argue that the Court’s approach to s. 35(1) in the same ruling as only recognizing “rights to discrete practices and customs” runs the risk “of reducing Aboriginality to a package of anthropological curiosities.”<sup>89</sup> Bastarache J.

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<sup>85</sup> *Ibid* at 9-11.

<sup>86</sup> See discussion below.

<sup>87</sup> *Van der Peet* (SCC), *supra* note 1 at para 46.

<sup>88</sup> “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 McGill LJ 993 at 1002.

<sup>89</sup> “Touring the Museum: A Comment on *R. v. Van der Peet*” (1997) 55 UT Fac L Rev 419 at 432.

acknowledged both of these concerns/criticisms when addressing the question of what “distinctive culture” means:

As previously explained, this Court in *Van der Peet* set out to interpret s. 35 of the Constitution in a way which captures both the aboriginal and the rights in aboriginal rights. Lamer C.J. spoke of the “necessary specificity which comes from granting special constitutional protection to one part of Canadian society” (para. 20). It is that aboriginal specificity which the notion of a “distinctive culture” seeks to capture. However, it is clear that “Aboriginality means more than interesting cultural practices and anthropological curiosities worthy only of a museum” (C. C. Cheng, “Touring the Museum: A Comment on *R. v. Van der Peet*” (1997), 55 U.T. Fac. L. Rev. 419, at para. 34).<sup>90</sup>

Bastarache suggests that these concerns echo Justice L’Heureux-Dubé’s point in her dissenting opinion in *Van der Peet*: “The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted.”<sup>91</sup> This led Bastarache to reconsider the concept of “culture,” yet, in the end, he perpetuates the atomistic and objectified conception of culture by maintaining, as alluded to above, the equation of practices with Aboriginal rights.

The conflicting acknowledgement of the concept of culture as “inherently cultural” while maintaining the Eurocentric conception is particularly notable during Justice Bastarache’s application of the *Van der Peet* test where he, on the one hand, suggests that “it would be a mistake to reduce the entire pre-contact distinctive Maliseet culture to canoe-building and basket-making. To hold otherwise would be to fall in the trap of reducing an entire people’s culture to specific anthropological curiosities and, potentially, racialized aboriginal stereotypes.”<sup>92</sup> Bastarache continues, though, *in the same paragraph*, by suggesting that “[t]he Court must therefore seek to understand how the particular pre-contact practice relied upon

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<sup>90</sup> *Sappier*, *supra* note 13 at para 42.

<sup>91</sup> *Van der Peet* (SCC), *supra* note 1 at para 150, quoted in *Sappier*, *supra* note 13 at para 43.

<sup>92</sup> *Ibid* at para 46.



relates to that way of life.”<sup>93</sup> So although Bastarache says that the culture of Aboriginal peoples should not be essentialized to specific anthropological curiosities or racialized stereotypes as a collection of a few, “integral” practices, he affirms that pre-contact practices can provide insights into the Aboriginal peoples’ “way of life.”

Yet Justice Bastarache’s suggestion that *particular* pre-contact practices relate to a way of life is, as I have argued, an approach that is fundamentally *lifeless* as it is based on a view of practices divorced from the contexts and relations of peoples’ lives in the world.<sup>94</sup> As I have alluded to, the atomism (and individualism) of Eurocentrism is an approach to both the “human world” as well as the physical universe.<sup>95</sup> As a result, both “culture” and the “individual” are similarly imagined: “cultures are imagined as discrete, bounded units, each unique – like a personality configuration.”<sup>96</sup> Thus, cultures are viewed as atoms of global human society, similar to individuals, and practices, customs and traditions within culture.<sup>97</sup> In turn, by viewing “culture” as a collection of objectified practices, customs and traditions “things-in-themselves,” it is also envisaged as a hierarchical model of bounded parts, and relationships between the atoms become secondary and external.<sup>98</sup> Meaning, identity and being are removed from processes or relationships and reduced to essences or intrinsic attributes thereby allowing the parts to be removed from their cultural contexts without altering them.<sup>99</sup> The cultural whole, then, is determined by the sum of the parts instead of the whole determining the parts as when

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<sup>93</sup> *Ibid.* I will discuss further Bastarache’s conception of “way of life” and its relationship with the Court’s formulation of the concept of “culture” in chapter 5. In this passage, though, one can begin to see that “way of life,” for the most part, is basically synonymous or interchangeable with “culture”—at least in how the Court has used, and continues to use (even in *Sappier*), the terms.

<sup>94</sup> See e.g. Ingold, “Two Reflections”, *supra* note 55 at 304.

<sup>95</sup> Richard Handler, “Authenticity” (1986) 2:1 *Anthropology Today* 2 at 2.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*; Gordon, *supra* note 18 at 34.

<sup>98</sup> *Ibid.* at 26.

<sup>99</sup> *Ibid.*; Tim Ingold, “The Man in the Machine and the Self-Builder” (2010) 35 *Interdisciplinary Science Reviews* 353 at 359 [Ingold, “The Man”].

one moves inside out in this hierarchical conception, the boundaries between the parts seem to dissolve.<sup>100</sup> But when moving in the opposite direction—outside in—the boundaries promptly reappear.<sup>101</sup> The Eurocentric conception of “culture” is similar to a lenticular print then: look at “culture” from one angle, it is a coherent whole, but change the angle, and it becomes a collection of discrete parts.

Another reason for this relationship between the parts and the cultural whole, and its importance in Eurocentric thought, is that because “culture” is treated as epistemology, immaterial practices, customs and traditions can be treated as material artifacts as in the culture element distributions that can be taken as evidence of “culture,”<sup>102</sup> and, therefore, “society”: “the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans”;<sup>103</sup> “In order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>104</sup> Note in this latter passage from *Sappier* that Bastarache J. explicitly separates action from practices, customs or traditions highlighting the separation of knowledge from performance and movement that is encouraged by the Eurocentric distinction between ontology and epistemology.<sup>105</sup>

Furthermore, if action is the materialization or performance of objectified practices, customs and traditions and, therefore, “culture,” when we move in the opposite direction actions

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<sup>100</sup> Gordon, *supra* note 18 at 26; Ingold, “Two Reflections”, *supra* note 55 at 305.

<sup>101</sup> *Ibid.*

<sup>102</sup> See generally Gaynor Macdonald, “Does ‘culture’ have ‘history’?: Thinking about continuity and change in central New South Wales” (2001) 25 *Aboriginal History* 176 at 190.

<sup>103</sup> *Van der Peet* (SCC), *supra* note 1 at para 44.

<sup>104</sup> *Sappier*, *supra* note 13 at para 20.

<sup>105</sup> See e.g. Gordon, *supra* note 18 at 32; Ingold, *Perception*, *supra* note 21 at 165.

can be inverted and dispositionalized as “culture.” Both the logic of inversion and dispositionism permeate Eurocentric thought, with scholars demonstrating the former in the genealogical model of orthodox anthropology,<sup>106</sup> and the latter in law, legal theorizing and policymaking.<sup>107</sup>

The logic of inversion, to begin with, evinces the two Great Divides as it is founded, on the one hand, on the conception of “culture” as being transmitted from an individual’s parents alongside their biological material. “Culture,” so formulated, inverts the interactions of people in and with the world into mental representations or cognitive rules, as I have been discussing, for constructing the world.<sup>108</sup> As a result, humans are separate from both “the non-human environment (now conceived as ‘nature’ ) and from one another.”<sup>109</sup> Again, “culture” becomes bounded and *lifeless* as the world of humanity is divided into discrete cultures that are an end product of a process of inversion in which people’s lives in a continuous world are removed into “a series of distinct and incommensurable ways of constructing it.”<sup>110</sup> “Culture” in this formulation is then something one lives or, as Lamer C.J. suggested above, participates *in*—distinct from their lives in “nature”—and the manifest behaviours and actions of the individual are considered to be outward expressions of the internal cognitive or representational schemas that belong to them as a result of cultural transmission.<sup>111</sup> Similarly, dispositionism is the

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<sup>106</sup> See e.g. Ingold, “Art of Translation”, *supra* note 27 at 218-19.

<sup>107</sup> Jon Hanson & David Yosifon, “The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture” (2003) 152 U Pa L Rev 129 at 133 [Hanson & Yosifon, “The Situation”], “The Situational Character: A Critical Realist Perspective on the Human Animal” (2004) 93 Geo LJ 1 at 6 [Hanson & Yosifon, “Situational Character”]. For example, Hanson illustrates how Eurocentric dispositionism of various forms has been influential starting back in classic liberal political theory: highlighting the dispositionist assumption that humans, by their very nature, have the freedom to order their actions as they choose in Locke’s contractual theory of society and the dispositionism in Rousseau’s claim that the natural condition of humanity was freedom, Hanson traces how dispositionist thought continues in contemporary law and social policymaking through its promise of “‘neat and predictable’ causal attributions.” *Ibid* at 10-13.

<sup>108</sup> Ingold, “Art of Translation”, *supra* note 27 at 218-19.

<sup>109</sup> *Ibid* at 230.

<sup>110</sup> *Ibid*.

<sup>111</sup> See generally Tim Ingold, “Introduction to Culture” in Tim Ingold, ed, *Companion Encyclopedia of Anthropology* (New York: Routledge, 1998) 329 at 330 [Ingold, “Introduction”], “The Man”, *supra* note 99 at 354.

tendency to explain “outcomes and behavior with reference to people’s dispositions,”<sup>112</sup> resulting in an individual’s actions being taken as outward manifestations of their thoughts.<sup>113</sup> It follows that if an individual’s actions are dispositionalized, and that dispositions are part of the body of information transmitted to the individual, “culture” is considered to also be the presumed basic, shared disposition of the individuals comprising “it,”<sup>114</sup> thereby reducing and homogenizing within-group variation.<sup>115</sup>

Both inversion and dispositionism, then, result in individuals and (their) “culture” becoming interchangeable,<sup>116</sup> as individual actions and behaviours are taken as outward expressions and manifestations of the cultural whole. As a result, Mrs. Van der Peet’s sale of ten salmon was inverted and dispositionalized into a question of whether exchange for money or other goods was integral to pre-contact Stó:lō culture: “She is claiming, in other words, that the practices, customs and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods. That this is the nature of the appellant’s claim can be seen through both the specific acts which led to her being charged and through the regulation under which she was charged. Mrs. Van der Peet sold 10 salmon for \$50.”<sup>117</sup> This inverted and dispositionist analysis

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<sup>112</sup> Adam Benforado & Jon Hanson, “The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy” (2008) 57 Emory LJ 311 at 314.

<sup>113</sup> Hanson & Yosifon, “Situational Character”, *supra* note 107 at 30.

<sup>114</sup> Jon Hanson & Kathleen Hanson, “The Blame Frame: Justifying (Racial) Injustice in America” (2006) 41 Harv CR-CLL Rev 413 at 428, n 54.

<sup>115</sup> Ronald Chen & Jon Hanson, “Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory” (2004) 77 S Cal L Rev 1103 at 1161-62. See too Ingold, “Art of Translation”, *supra* note 27 at 225-26.

<sup>116</sup> “Aboriginal nations are characterized as ... a culturally homogeneous collective of people ... sharing a common language, traditions, customs and historical experience.” *Tsilhqot’in Nation v British Columbia*, [2008] 1 CNLR 112 at para 458 [*Tsilhqot’in*].

<sup>117</sup> *Van der Peet* (SCC), *supra* note 1 at paras 76-77. Lamer CJ may actually have made an error in applying the test he develops: at para 44 he writes that “the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those *pre-existing* distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America *prior to contact with the Europeans*.” *Ibid* [emphasis added]. Furthermore, he writes later, “Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), *it is to that pre-contact period that the courts must look in identifying aboriginal rights*.” *Ibid* at para 60 [emphasis added]. Lamer appears to *incorrectly* characterize Mrs. Van der Peet’s claim as “that the practices, customs and traditions of the Sto:lo *include* as an integral part the exchange of fish for

of individual actions to the cultural whole buttresses the Court's assertion that Aboriginal rights are held communally but exercised by individuals.<sup>118</sup>

Further, because "culture"—regardless of how it is defined—involves a high level of abstraction,<sup>119</sup> inverting and dispositionalizing individual's actions to a culture whole allowed Lamer C.J. to narrow and/or restrict Aboriginal rights and their characterization: "The social test casts the aboriginal right in terms that are too broad and in a manner which distracts the court from what should be its main focus — the nature of the aboriginal community's practices, customs or traditions themselves."<sup>120</sup> This focus on objectified practices, customs or traditions reflects a general tendency in Eurocentric thought in which "[r]eality is directly proportional to materiality," so that "the more physical, the more real."<sup>121</sup> For example, as has been pointed out with regarding to language rights, "language rights are predicated on an idea of languages as things in the world: One cannot have a right to something that is not objectively identifiable."<sup>122</sup> This is supported by Justice L'Heureux-Dubé's dissenting opinion mentioned above where she criticized Lamer's atomistic approach to Aboriginal culture,<sup>123</sup> favouring an alternate approach that "describes aboriginal rights in a fairly high level of abstraction."<sup>124</sup> In other words, the approach to Aboriginal rights developed by Lamer involves an inversion of reality and the

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money or other goods." *Ibid* at para 76 [emphasis added]. Thus, regardless of any lack of evidence regarding whether Mrs. Van der Peet "had sold salmon on other occasions or on a regular basis" (*ibid* at para 77), *contemporary* practices, customs and traditions *do not* enter the test Lamer himself created until *after* the characterization stage.

<sup>118</sup> See e.g. *Sappier*, *supra* note 13 at para 26: "The right to harvest wood for domestic uses is a communal one.... The right to harvest (which is distinct from the right to make personal use of the harvested product even though they are related) is not one to be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve."

<sup>119</sup> See e.g. Ingold, "Introduction", *supra* note 111 at 330.

<sup>120</sup> *Van der Peet* (SCC), *supra* note 1 at para 52.

<sup>121</sup> Gordon, *supra* note 18 at 24.

<sup>122</sup> Peter Whiteley, "Do 'Language Rights' Serve Indigenous Interests?: Some Hopi and Other Queries" (2003) 105 *American Anthropologist* 712 at 713.

<sup>123</sup> See text accompanying note 91.

<sup>124</sup> *Van der Peet* (SCC), *supra* note 1 at para 149.

abstract through the dispositionalization of objectified practices, customs and traditions to “culture.”

The logic of inversion also manifests the two Great Divides through it producing an opposition between the particular and the universal.<sup>125</sup> Earlier I discussed how the external Great Divide creates the distinction between “Us” and “Them,”<sup>126</sup> another implication of this, from the Eurocentric perspective, is that people’s lives and experiences in the world are converted into a (cultural) boundary, where, much like the conception of “culture” from the dispositionist perspective, those who share a similar life-world become “Us” as opposed to the “Them” who do not.<sup>127</sup> Difference becomes pushed onto this boundary between Us and Them, and similar to dispositionism, homogenizing and creating an artificial uniformity within each category “with the result that [difference] comes to be seen as a property of boundaries, of discontinuity and contrast, as opposed to the uniformity that is supposed to prevail within them.”<sup>128</sup> By sealing individuals and “cultures” inside an outer boundary or shell, the logic of inversion allows the resulting discrete units or entities to be classified within a hierarchical taxonomy.<sup>129</sup> These boundaries then also create and sustain racial and cultural discriminations and stereotypes, which are both enfolded into and unfolded through creating the taxonomical classifications.

### **III. “Culture” & Eurocentric Typologies**

The logic of inversion can be seen in the development of international law when nineteenth century positivists attempted to develop a scientific methodology that could give order to

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<sup>125</sup> Tim Ingold, *Being Alive: Essays on Movement, Knowledge and Description* (New York: Routledge, 2011) at 68.

<sup>126</sup> See text accompanying note 33 and following.

<sup>127</sup> Ingold, “Art of Translation”, *supra* note 27 at 228.

<sup>128</sup> *Ibid.*

<sup>129</sup> See e.g. Ingold, “The Man”, *supra* note 99 at 355.

international relations.<sup>130</sup> Central to this project was the belief that certainty could be established through the classification of facts and rules.<sup>131</sup> Therefore, the haphazardness, flux, and uncertainty of these relations in the world were inverted through an ordering and understanding facilitated by a fixed set of principles that classified and reconstituted practice into a coherent and complete legal framework and typologies.<sup>132</sup> “This scientific methodology,” writes legal scholar Antony Anghie, highlighting the role of science and the second Great Divide, “favored ... a movement towards abstraction—a propensity to rely upon a formulation of categories and their systematic exposition as a means of preserving order and arriving at the correct ‘solution’ to any particular problem.”<sup>133</sup>

At the same time as these nineteenth century positivists were developing their sociocultural-legal framework, their contemporaries in anthropology were also creating a parallel taxonomic framework of categories focusing on cultural evolution and variation. This evolutionary taxonomic framework is of significance in the contexts of the doctrine of Aboriginal rights as many of the concepts formulated by evolutionary anthropologists form the foundation for the concepts the Court has imported into their doctrine. Another significant factor of consequence in these taxonomies is that the evolutionary taxonomies were developed partly in an attempt to understand cultural change and, as a result, by looking at Indigenous peoples this was a way to “look back in time.”<sup>134</sup>

To understand the Eurocentric typologies, we need to first go back a bit further in the intellectual genealogy of the two Great Divides that permeate evolutionary anthropological

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<sup>130</sup> Anghie, *supra* note 41 at 19. It is, as I will attempt to show in the following, also integral to the Court’s analysis of Aboriginal rights.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid* at 20.

<sup>133</sup> *Ibid* at 21.

<sup>134</sup> As mentioned above, the nineteenth century positivists also held this belief that Indigenous peoples were like “living fossils” of earlier stages in the development of sovereignty. See text accompanying note 44.

thought to the classic liberal political theory of Thomas Hobbes,<sup>135</sup> and particularly his influential “state of nature” theory. Basically Hobbes used the state of nature (where the Indigenous peoples of the Americas were taken as the exemplar), as a foil in developing his theory of the origin of civil society, government and politics. Hobbes posited that Indigenous peoples were a contemporary instantiation of a supposed original state of nature, living in isolation, lacking in “society,” government and law.<sup>136</sup> “Civil society,” according to Hobbes and those who followed him, was believed to have arisen “to correct or eliminate the shortcomings of associations between people in the state of nature” through conventions made by individuals interested in leaving that supposed original state.<sup>137</sup> For example, Hobbes refers to being in the state of nature as an “ill condition” that the state of society, under an artificial man-state and sovereign, apparently “cures.”<sup>138</sup> And while Hobbes acknowledged that individuals in the state of nature could be rational, thereby maintaining continuity between human beings in both states, passions dominated individuals in the state of nature.<sup>139</sup> Thus, the state of society represented a “higher level” or realization of rationality,<sup>140</sup> as he felt that civil society/the state saved individuals from their “natural” passions and educated them so that they placed the long-term interests of the collectivity first.<sup>141</sup> Although Hobbes relied on the first, internal Divide, separating humans from non-humans by arguing that the latter lack rationality to enter into the

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<sup>135</sup> In Latour’s discussion of the two Great Divides and how they arose, he traces it back to the dispute/debate between Hobbes and the natural philosopher Robert Boyle. *Supra* note 26 at ch 2. Much of this current discussion of Hobbes owes its inspiration, but not any of its errors, to Henderson’s insights in “The Context of the State of Nature” in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 11 [Henderson, “State of Nature”].

<sup>136</sup> Hobbes, *supra* note 29 at 187-88. See too Henderson, “State of Nature”, *supra* note 135 at 17.

<sup>137</sup> *Ibid* at 18.

<sup>138</sup> Hobbes, *supra* note 29 at 188; Henderson, “State of Nature”, *supra* note 135 at 23.

<sup>139</sup> Hobbes, *supra* note 29 at 377-81. See too Henderson, “State of Nature”, *supra* note 135 at 16.

<sup>140</sup> “And thus much for the ill condition, which man by meer Nature is actually placed in; though with a possibility to come out of it, consisting partly in the Passions, partly in his Reason.” Hobbes, *supra* note 29 at 188.

<sup>141</sup> *Ibid* at 192. See also Henderson, “State of Nature”, *supra* note 135 at 16.



covenants that create commonwealths,<sup>142</sup> the second, external Divide resulted from his contrasting of humans in the state of nature and those in the state of society. And due to the belief that humans in the state of nature did not have all the benefits resulting from the state of society came Hobbes' famous dictum: "And the life of man, solitary, poore, nasty, brutish, and short."<sup>143</sup>

Hobbes' portrayal of "the life of man" in the state of nature most explicitly appears in Canadian Aboriginal rights jurisprudence in the heavily criticized<sup>144</sup> British Columbia Supreme Court (BCSC) ruling of *Delgamuukw v. B.C.* where Chief Justice McEachern wrote in the outline of the claim and territory:

Similarly, it would not be accurate to assume that even pre-contact existence in the territory was in the least bit idyllic. The plaintiffs' ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs, [*sic*] that aboriginal life in the territory was, at best, "nasty, brutish and short."<sup>145</sup>

McEachern also indicates a Hobbesian influence when he later wrote that he did "not accept the ancestors [of the plaintiffs] 'on the ground' behaved as they did because of '*institutions*.' Rather I find they more likely acted as they did because of *survival instincts* which varied from village to village."<sup>146</sup> Thus we see a contrast between the existence of humans in the realm of society and in the realm of nature. Importantly, though, only those in the state of society are believed to have law and justice: "To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no

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<sup>142</sup> Among the six reasons Hobbes gives for the lack of commonwealths between non-humans, he suggests, "Thirdly, that these creatures, having not (as man) the use of reason, do not see, nor think they see any fault, in the administration of their common businesse"—unlike with "men." *Supra* note 29 at 226.

<sup>143</sup> *Ibid* at 186.

<sup>144</sup> Among many examples, see the collection of articles in Bruce G Miller, ed, "Special Issue: Anthropology and History in the Courts" (1992) 95 BC Studies.

<sup>145</sup> *Delgamuukw v BC*, [1991] 5 CNLR 1 at 11 (BCSC) [*Delgamuukw* (BCSC)].

<sup>146</sup> *Ibid* at 199 [emphasis added].

place. Where there is no common Power, there is no Law: where no Law, no Injustice.”<sup>147</sup> This was reflected in the nineteenth century positivists’ development of an international legal framework when they argued that law only existed through covenants: “Law is not imposed from above by a sovereign but agreed upon by the relevant entities. Law exists where there is regularity in dealings, when the members of the society regard themselves as bound by the rules, and where sanctions of some sort would follow a breach.”<sup>148</sup> “Society,” then, became fundamental to the definition of law for the nineteenth century positivists—as with Hobbes—but it also became the central concept used, and *not* sovereignty, when they constructed their international legal framework.<sup>149</sup>

Thus, in *In re Southern Rhodesia* Lord Sumner for the Privy Council wrote, “The estimation of the rights of aboriginal tribes is always inherently difficult.”<sup>150</sup> This difficulty, though, was not due to “cultural” differences, but rather through the concept of “society”: “Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged.”<sup>151</sup> This is important to be mindful of, as it provides insights into the problems contemporary Canadian courts have.

Returning to how the concept of “society” allowed the nineteenth century positivists to link cultural differences to legal ones in constructing their international legal framework,<sup>152</sup> the concept of “society” accomplished this as it allowed them to “divide the civilized from the uncivilized and thereby demarcate in legal terms the exclusive sphere occupied by European

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<sup>147</sup> Hobbes, *supra* note 29 at 188.

<sup>148</sup> Anghie, *supra* note 41 at 17.

<sup>149</sup> *Ibid.*

<sup>150</sup> [1919] AC 211 (PC) at 233 [*Southern Rhodesia*].

<sup>151</sup> *Ibid.*

<sup>152</sup> Anghie, *supra* note 41 at 28.

states.”<sup>153</sup> Thus, the second, external Great Divide that arose through Hobbes’ arguments permitted positivists to establish a distinction between a civilized “Us” and an uncivilized or primitive “Them.” This, in turn, allowed those jurists to look to anthropology in particular, for information regarding the characteristics of the “savages.”<sup>154</sup> Nineteenth century positivist jurisprudence, then, “sought to combine anthropological insight with taxonomic precision: each entity was to be studied, its degree of civilization ascertained, and its legal status accordingly allocated.”<sup>155</sup>

Anthropology was also developing its own taxonomy of civilization at the same time, as mentioned above, that paralleled the arguments made by the positivists: both were concerned with ordering based on a fixed set of principles of classification and both were based on a unilineal evolutionary scheme that allowed the “primitive” being viewed as a “living fossil” of earlier stages of evolution.<sup>156</sup>

A classic example of a nineteenth century unilineal evolutionary scheme in anthropology is Lewis Henry Morgan’s *Ancient Society*.<sup>157</sup> Recall that anthropology of this time equated “Culture” (as the capacity of reason that separated humans from non-humans) with “civilization” based on the belief that the latter represented the highest level in the realization of this capacity.<sup>158</sup> Based on this assumption, Morgan defined three levels of progress or “ethnic

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<sup>153</sup> *Ibid* at 32.

<sup>154</sup> *Ibid*.

<sup>155</sup> *Ibid* at 46.

<sup>156</sup> See text accompanying note 134. For a discussion of this in nineteenth century positivist jurisprudence see Anghie, *supra* note 41 at 20, 68-69, 71-72.

<sup>157</sup> (Chicago: Charles H Kerr & Company, 1877). Perhaps of interest is another way in which law and anthropology were connected during this period: while Morgan studied a number of subjects in university, he actually ended up becoming a lawyer—though he eventually became much more interested in the local Iroquois to the detriment of his legal practice. See e.g. Jerry Moore, *Visions of Culture: An Introduction to Anthropological Theories and Theorists*, 2d ed (New York: Altamira Press, 2004) at 19-20.

<sup>158</sup> See e.g. text accompanying note 27.

periods” of savagery, barbarism, and civilization.<sup>159</sup> Morgan felt that these levels/periods were well-defined stages of increasing “progress” that could be measured by four sets of cultural “achievements” in particular: 1) inventions and discoveries; 2) the idea of government;<sup>160</sup> 3) organization of the family; and 4) the concept of property.<sup>161</sup> Like most other evolutionary approaches in anthropology, Morgan’s was fairly materialistic and took technological innovations (achievement #1)—particularly those related to subsistence—as primary and distinguished between the stages of his taxonomy based on certain technological developments.<sup>162</sup> For example, the “Upper Status of Savagery”<sup>163</sup> began with the invention of the bow and arrow but ended when the art of pottery was invented.<sup>164</sup>

By assuming that cultural evolution was unilinear, anthropologists of that time, again, assumed that Eurocentric culture was the fullest development of “Culture”/rationality. The human species then “commenced their career at the bottom of the scale and worked their way up from savagery to civilization through the slow accumulations of experimental knowledge.”<sup>165</sup> And because “Culture” was what separated humans from non-humans, the three “distinct conditions” of savagery, barbarism and civilization “are connected with each other in a natural as well as necessary sequence of progress.”<sup>166</sup> Thus, by naturalizing “Culture” and “progress”/evolution, the “principal tribes of mankind” could be classified into those discrete, “distinct conditions” based on the degree of their “relative progress” in the “achievements” he

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<sup>159</sup> Morgan, *supra* note 157 at 3.

<sup>160</sup> In today’s anthropological parlance, this would be referred to as social and political organization. Moore, *supra* note 157 at 27. Though “social organization” also overlaps with Morgan’s third “achievement” and, similarly, “political organization” partially overlaps with the fourth. *Ibid* at 26-27.

<sup>161</sup> Morgan, *supra* note 157 at 3-7; Moore, *supra* note 157 at 26.

<sup>162</sup> See e.g. Morgan, *supra* note 157 at 9.

<sup>163</sup> Morgan divided the savagery and barbarism stages into three levels—lower, middle, and upper—but not civilization. *Ibid*.

<sup>164</sup> Morgan felt that this change was “the most effective and conclusive test” for dividing “savagery” from the (lower) stage of barbarism. *Ibid* at 10, 12.

<sup>165</sup> *Ibid* at 3.

<sup>166</sup> *Ibid*.

had identified.<sup>167</sup> In other words, Morgan explained cultural variation found in the world through different levels of progress along a single, common path of cultural evolution, and it was based on such unilineal evolutionary reasoning that the Eurocentric “burden” of “civilizing” Indigenous peoples was justified. Thus, instead of describing reality, the two Great Divides served, and continue to serve, to define the way relations are established between the Eurocentric “Westerner” and others.<sup>168</sup> Morgan’s taxonomy also dovetails with his positivist contemporaries as by distinguishing multiple sublevels among the conditions of savagery and barbarism, but not among condition of civilization, he too ends up contrasting the “civilized” with the “uncivilized.”

Unilineal evolution was abandoned in anthropology around the turn of the century, but the idea of cultural evolution had a revival in the late 1940s that again implicated anthropological taxonomies with the legal arena and Indigenous rights. These neo-evolutionists in anthropology felt that there were problems with the data and the conclusions the nineteenth century evolutionists drew from them, but believed that the idea of cultural evolution still held importance “from the implications of its scientific objectives, its taxonomic procedures, and its conceptualization of historical change and cultural causality.”<sup>169</sup> But instead of the “natural” and necessary sequence of the nineteenth century unilineal evolutionists, these neo-evolutionist taxonomies were based on the premise that human beings change their societies and cultures through adaptations to, and other interactions with, the world.<sup>170</sup>

Of these neo-evolutionists in anthropology, Julian Steward is of particular import for this discussion as he developed a “multilineal” framework within the contexts of the Indian Claims

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<sup>167</sup> *Ibid* at 9. Again we see how classifications and taxonomies are based on creating discrete categories/atoms.

<sup>168</sup> Latour, *supra* note 26 at 103.

<sup>169</sup> Julian H Steward, “Evolution and Process” in AL Kroeber, ed, *Anthropology Today* (Chicago: University of Chicago Press, 1953) 313 at 313 [Steward, “Evolution”].

<sup>170</sup> See e.g. *ibid* at 313-14; Leslie White, “Energy and the Evolution of Culture” (1943) 45 *American Anthropologist* 335.

Commission in the United States<sup>171</sup> and, as the anthropologists Marc Pinkoski and Michael Asch have cogently argued,<sup>172</sup> the influence of his evolutionary taxonomy are quite apparent in Aboriginal rights litigation in Canada.<sup>173</sup> As part of his evolutionary framework, Steward developed a methodology he referred to as “cultural ecology” which involved “the study of the processes by which a [human] society adapts to its environment” and focused on analyzing “social transformations or evolutionary change.”<sup>174</sup> Steward felt that how a people adapted to their local environmental conditions was dependent upon their technology, needs, and structure of their society as well as the nature of those environmental contexts.<sup>175</sup> Thus, similar to Morgan before him, Steward believed that the two most important factors in determining the overall society were “the requirements of subsistence patterns established in particular environments.”<sup>176</sup>

The relationship of “culture” and “society” for Steward was comparably convoluted to that of the Court in Canada though:

Culture is generally understood to mean learned modes of behavior which are socially transmitted from one generation to another within particular societies and which may be diffused from one society to another. A society is a particular group of people whose relationships have a special pattern, but there is no such thing as society in the abstract, for the nature of any such group is determined by its cultural heritage. Culture on the other hand does not exist without societies, and

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<sup>171</sup> See e.g. Sheree Ronaasen, Richard O Clemmer & Mary Elizabeth Rudden, “Rethinking Cultural Ecology, Multilinear Evolution, and Expert Witnesses: Julian Steward and the Indian Claims Commission Proceedings” in Richard O Clemmer, L Daniel Myers & Mary Elizabeth Rudden, eds, *Julian Steward and the Great Basin: The Making of an Anthropologist* (Salt Lake City: University of Utah Press, 1999) 170; Marc Pinkoski, “Julian Steward, American Anthropology, and Colonialism” (2008) 4 *Histories of Anthropology Annual* 172.

<sup>172</sup> See e.g., among others, “Anthropology and Indigenous Rights in Canada and the United States: Implications in Steward’s Theoretical Project” in Alan Barnard, ed, *Hunter-Gatherers in History, Archaeology and Anthropology* (Oxford: Berg, 2004) 187 at 198.

<sup>173</sup> For example, Sheila Robinson, the Crown’s expert witness in *Delgamuukw*, suggested that she presented a theoretical model that was based on Steward’s framework. See in Dara Culhane, “Adding Insult to Injury: Her Majesty’s Loyal Anthropologist” (1992) 95 *BC Studies* 66 at 78.

<sup>174</sup> Julian H Steward, “Ecology: Cultural Ecology” in David L Sills, ed, *International Encyclopedia of the Social Sciences*, vol 4 (New York: The Macmillan Company, The Free Press, 1968) 337 at 337 [Steward, “Ecology”].

<sup>175</sup> *Ibid.*

<sup>176</sup> Julian H Steward, *Theory of Culture Change: the methodology of multilinear evolution* (Chicago: University of Illinois Press, 1955) at 208 [Steward, *Culture Change*].

societies have no forms or functions that are not determined by culture. Society and culture are different though complementary concepts.<sup>177</sup>

When we combine this passage with the analogy he continually makes with the biological and ecological sciences,<sup>178</sup> we can again see the animal plus conception of the human person comprised of parallel transmission of biological matter and cultural information/heritage. To mediate between the resulting separation of society and culture from the world or environment, Steward places subsistence patterns, which form part of what he calls the “culture core”: “the constellation of features which are most closely related to subsistence activities and economic arrangements” that “includes such social, political, and religious patterns as are empirically determined to be closely connected with these arrangements.”<sup>179</sup> The “culture core,” in other words, are those aspects of a society’s culture that act as a “bridge” through which social beings interact with the surrounding world through their “traditional means of sustenance.”

We can see a similar kind of reasoning in *Van der Peet* in how all three opinions separate “culture” from “social organization”<sup>180</sup> while still associating both with practices, customs and traditions. It is particularly notable in Chief Justice Lamer’s discussion of the dual focus in determining whether a successful claim has been made where he suggested that Aboriginal rights not only “arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land.”<sup>181</sup> As a result, the “courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant’s distinctive culture and society.”<sup>182</sup>

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<sup>177</sup> Julian H Steward, *Area Research: Theory and Practice*, Social Science Research Council Bulletin 63 (New York: Social Science Research Council, 1950) at 98-99 [Steward, *Area Research*].

<sup>178</sup> For example, Steward, “Evolution”, *supra* note 169 at 313, “Ecology”, *supra* note 174 at 337, *Culture Change*, *supra* note 176 at 51.

<sup>179</sup> *Ibid* at 37.

<sup>180</sup> Though Justice L’Heureux-Dubé makes this distinction by far the most in the ruling.

<sup>181</sup> *Van der Peet* (SCC), *supra* note 1 at para 74.

<sup>182</sup> *Ibid* [underlining in original].

Thus, Lamer maintains the separation between “nature” and “culture” but also that the parts of “culture” and social organization, similar to Steward’s culture core, are part of the relationship an Aboriginal peoples’ have with the land,<sup>183</sup> with another part that is distinct from that relationship. Moreover, by distinguishing culture from social organization, Lamer laid the foundation for, as we shall see, the continuing use of the latter to determine Aboriginal rights as well as perpetuating implicit, evolutionary assumptions that maintain a racial, ethnocentric hierarchy.

Steward’s formulation of “culture” as “culture core,” though, allows him to assert that it determines, gives concreteness to and integrates “society” into a whole. Importantly, though, this only applies to some cultures and societies: due to his continual analogies with biology, Steward held that there is a developmental progression similar to organisms from simple to complex. This resulted in Steward asserting that because higher levels of sociocultural systems were more complex in terms of segmentation (parts) and organizations, studying these systems required the involvement of “many more specialized disciplines” to study.<sup>184</sup> “Among most primitive peoples,” in contrast, because “the localized unit is the sociocultural whole; the society is small and self-contained and the culture is fairly simple,” a single person can use the ethnographic method “since it is comparatively easy to study the functional interrelationship of all aspects of

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<sup>183</sup> At the end of the same paragraph quoted here, Lamer transforms the dual foundation for Aboriginal rights he introduces there to, partly, “the relationship of aboriginal peoples *with* the land.” *Ibid* [emphasis added].

<sup>184</sup> Steward, *Area Research*, *supra* note 177 at 114. This opposition between “simple,” “traditional” Indigenous societies and cultures and “complex,” “modern” Eurocentric society and culture is also expressed in the literature on each category: prior to the reflexivity shift in anthropology in the late 1960s, ethnographies of “tribal”/“primitive” peoples were comprehensive, covering the entire “culture” (or whatever the outside observer felt was representative or “integral”) of a particular people. But when anthropologists “came home from the tropics,” as discussed in chapter 1, this ability to represent an entire people in a single monograph was challenged. Latour, *supra* note 26 at 100-01. This opposition in the representation of “simple” peoples and societies with “complex” ones produces, according to Henderson, an implicit assumption that the test for Aboriginal rights in Canada is based upon: “From this conceit—that a ‘simple’ society could be described adequately in one book when European society has not even begun to exhaust its possibilities (and its ambiguities) in a hundred thousand books—arises the presumption that a Euro-Canadian jurist today can sit in judgment of what a pre-colonial First Nations peoples once believed or valued most.” Henderson, *First Nations Jurisprudence*, *supra* note 75 at 209.



behavior in small independent societies.”<sup>185</sup> Again, as with Hobbes, nineteenth century positivists and Morgan, Steward sets up a contrast between what is now worded as the modern and the primitive.

To construct his developmental or evolutionary taxonomy, Steward grouped together those cultures which shared similar cores into what he called “cultural types.”<sup>186</sup> (And because Steward is dealing with only “primitive” peoples in developing his theory, “culture” and “society” are virtually synonymous.) The culture cores used in creating cultural types must not only be “determined by cross-cultural regularities of cultural ecological adaptation,” the cores must also be of a similar “level of sociocultural integration.”<sup>187</sup> This latter notion refers to a “functional interdependence” of sociocultural phenomena within some sort of “organizational whole or system.”<sup>188</sup> In other words, the sociocultural system is “a unit, the social segments and institutions of which have a significant degree of interrelationship and functional interdependence.”<sup>189</sup> Thus, the more complex, the more integrated the sociocultural systems is or has to be. And because “culture” is “concretely manifest” in society due to its role in determining the structure and function of a particular society, Steward argued, again based on a biological analogy, that “sociocultural units represent levels of organization.”<sup>190</sup> In this, Steward betrays a dispositionist bias as he defines “culture” as modes of behaviours, but then suggests these sociocultural units “are not wholly reducible to biological, psychological, or even cultural phenomena.”<sup>191</sup> Because behaviour can be observed, sociocultural units, although an abstraction

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<sup>185</sup> Steward, *Area Research*, *supra* note 177 at 114-15.

<sup>186</sup> Steward, *Culture Change*, *supra* note 176 at 88-89, 180-81.

<sup>187</sup> *Ibid* at 89.

<sup>188</sup> Steward, *Area Research*, *supra* note 177 at 95.

<sup>189</sup> *Ibid* at 106.

<sup>190</sup> *Ibid* at 108.

<sup>191</sup> *Ibid*.

representing a kind of society, have an empirical foundation and so Steward's taxonomy supposedly reflects reality—but only via the logic of inversion.<sup>192</sup>

“Sociocultural integration,” then, refers to the relationship between the parts and the sociocultural unit whole. Steward goes on to argue that if there are levels of the sociocultural and the biological, they then “*must* be divided into sublevels.”<sup>193</sup> These sublevels, though, are hierarchical: “According to the principle of sociocultural sublevels, each higher sublevel is more complex than the lower ones not only in the qualitative sense that it has more parts but, as in biological sublevels, that it has qualitatively novel characteristics or unique properties which are not evident in or foreshadowed by the lower ones.”<sup>194</sup> And it is here where Steward's levels of sociocultural integration and the resulting taxonomy will become more familiar to Aboriginal rights in Canada.

Steward identified three basic levels of sociocultural integration: the family or band,<sup>195</sup> the multifamily,<sup>196</sup> and the state or nation.<sup>197</sup> This hierarchical, Eurocentric typology of social organization has since been refined in anthropology to the perhaps more familiar categories of families, bands, tribes, chiefdoms, and nation state.<sup>198</sup> Though refined, one can see that the distinction between the “primitive” and the “civilized” and the translation of cultural difference into social difference (and vice versa) is maintained: “The traditional and fundamental division of culture into two great stages, primitive and civilized, is usually recognized as a social

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<sup>192</sup> *Ibid* at 106, 112. See text accompanying note 121 regarding how this view by Steward reflects a general tendency in Eurocentric thought.

<sup>193</sup> *Ibid* at 108 [emphasis added].

<sup>194</sup> *Ibid* at 110.

<sup>195</sup> Sometimes Steward equates the family and band (see e.g. *Culture Change*, *supra* note 176 at 51) and sometimes he holds the family as a distinct, and lower, level (see e.g. *ibid* at 54).

<sup>196</sup> Which Steward sometimes refers to as “folk society” (see e.g. *ibid*) or as “tribes” (see e.g. *ibid* at 13, 53). (Even though he is often critical of the term/category of “tribe.” See e.g. *Area Research*, *supra* note 177 at 112.)

<sup>197</sup> See e.g. Steward, *Culture Change*, *supra* note 176 at 54.

<sup>198</sup> See e.g. Marshall D Sahlins & Elman R Service, *Evolution and Culture* (Ann Arbor: University of Michigan Press, 1960) at 37.

distinction: the emergence of a special means of integration, the state, separates civilization from primitive society organized by kinship.”<sup>199</sup> Again similar to Hobbes, the nineteenth century positivists, and particularly Morgan, there is the nation state of the civilized and various gradations and levels of development and “progress” among the primitives.

Each category in this evolutionary taxonomy are distinguished based on the amount of social segmentation and integration, similar to discussions in biology, and reflect the Great Divides of Eurocentrism. Thus, the family (a purely biological category) is prior to the “least advanced” category at the primitive level, which reflects that a significant feature or product of “progress” is the increasing weakening of kinship ties.<sup>200</sup> Traits of the “least advanced” category of the primitive level—bands—include that they are comprised of, at most, several families, with no formal political leadership, subsist by hunting, gathering and fishing, and are, therefore, considered “nomadic.”<sup>201</sup> The next developmental level is the tribe, which include larger kinship groups such as clans or lineages, they tend to be agriculturalists or pastoralists (and are therefore more “settled”), but still lack a formalized, central authority and political organization. Chiefdoms have an even larger population, a permanent, centralized political structure under one recognized leader (a “chief”), have social stratification (primarily based on kinship) and the development of specialized roles due to greater productivity in agriculture. Thus, as with Morgan, these neo-evolutionary taxonomies of sociocultural organization hold that as “culture” evolved, a group’s social, political and economic organization became more complex, and “traditional means of sustenance” were central as through it one could measure the “all-round adaptability” which signalled higher levels of “progress” and the associated traits that goes along

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<sup>199</sup> *Ibid* at 36.

<sup>200</sup> See e.g. *ibid* at 37.

<sup>201</sup> This discussion of the traits of the various categories of sociocultural units/organization is primarily drawn from *ibid* at 37 and Peoples & Bailey, *supra* note 65 at 240-46.

with it.<sup>202</sup> In other words, the less a given “culture” was “controlled” by nature—whether in terms of biological kinship or in terms of sources of sustenance—the more it was evolved and “civilized.” Again we see how the first, internal Great Divide provides the rationale for the second, external Divide.<sup>203</sup> Note, though, that the actual lives of the people who are categorized in this taxonomy are nowhere to be found!

One of the earliest manifestations of this kind of evolutionary categorical thought in Canadian courts was in *Baker Lake (Hamlet of) v. Minister of Indian and Northern Development* where Justice Mahoney formulated a test for common law Aboriginal title that meant that Aboriginal claimants had to first prove “[t]hat they and their ancestors were members of an organized society.”<sup>204</sup> Mahoney justified this requirement based on the “*dicta*” of the Privy Council in *Southern Rhodesia* and proceeded to quote the passage from that ruling partly reproduced above.<sup>205</sup> Mahoney, then, perpetuated an ethnocentric, evolutionary line of reasoning that traces its roots back to Hobbes, ignoring Justice Hall’s rejection of such analyses based on “ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.”<sup>206</sup>

Again ignoring Justice Hall’s criticism, McEachern C.J. continually relied on the same constitutional reasoning in *Southern Rhodesia* and *Baker Lake* in his BCSC ruling in *Delgamuukw* on Aboriginal title. Not only did McEachern quote Hobbes that pre-contact Aboriginal life was, at best, nasty brutish and short, he also, as mentioned, found that the pre-

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<sup>202</sup> Sahlins & Service, *supra* note 198 at 37.

<sup>203</sup> Ingold has made a similar point: “I should like at this point to draw attention to the remarkable parallel between the argument for the uniqueness of western culture and the argument for the uniqueness of humankind.” “Art of Translation”, *supra* note 27 at 215.

<sup>204</sup> [1980] 1 FC 518 at 557-58 [*Baker Lake*].

<sup>205</sup> See text accompanying notes 150-151.

<sup>206</sup> *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at 346 [*Calder*].

contact ancestors of the Gitksan and Wet'suwet'en plaintiffs acted because of survival instincts rather than institutions.<sup>207</sup> By holding this conclusion, McEachern brought the personhood of the Gitksan and Wet'suwet'en ancestors into question,<sup>208</sup> and, in addition to the obvious ethnocentrism in his assertion, his statement that the survival instincts “varied from village to village” highlights how the two Great Divides work together: variation in instinct entails biological variation, but McEachern's assertion is only possible by assuming a prior distinction between “Us” and “Them.” McEachern also quotes the same passage from *Southern Rhodesia* as Justice Mahoney did in *Baker Lake*, which led him to also adopt Mahoney's view that resonates with Stewardian cultural ecology: “the relative sophistication of the organization of any society will be a function of the needs of its members, [and] the demands they make of it.”<sup>209</sup> So while Justice Judson acknowledged the fact “that when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries” in *Calder v. Attorney-General of British Columbia*,<sup>210</sup> the courts in *Baker Lake*, McEachern's *Delgamuukw* and even *R. v. Sparrow*<sup>211</sup> held the same view as the nineteenth century positivists and unilineal evolutionists that “institutions” and “society” only arose at a certain level of cultural evolution. And because Aboriginal peoples lacked Eurocentric “badges of civilization,”<sup>212</sup> their possession of “institutions” and “society” was also in question.

In the *Van der Peet* analysis of constitutionalized Aboriginal rights though, Lamer C.J. reasserted Justice Judson's point to support his approach to s. 35(1), thereby entrenching that

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<sup>207</sup> *Delgamuukw* (BCSC), *supra* note 145 at 199.

<sup>208</sup> See too Michael Asch, “The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*” (2000) 5 Rev Const Stud 119 at 122.

<sup>209</sup> *Delgamuukw* (BCSC), *supra* note 145 at 213 quoting *Baker Lake*, *supra* note 204 at 559 [alteration in original].

<sup>210</sup> *Supra* note 206 at 328 [emphasis added].

<sup>211</sup> [1990] 1 SCR 1075 at 1094.

<sup>212</sup> *Delgamuukw* (BCSC), *supra* note 145 at 26.

Aboriginal peoples were organized in societies prior to contact with Europeans.<sup>213</sup> Although the burden to prove that an Aboriginal claimant's ancestors lived in an organized society prior to contact may have been dropped, this does not mean the logic underlying the burden disappeared. Instead, the burden shifted from one of personhood and cultural evolution to a style of taxonomic or categorical thought still based on the same evolutionary reasoning. Thus to this day the Court often attempts to decide whether the Aboriginal claimant's ancestors were at a band or tribal level of social organization as part of determining whether a constitutional claim to an Aboriginal right is valid.<sup>214</sup> Explicitly highlighting the connection of these levels of organization to the ethnocentric, evolutionary reasoning of *Baker Lake*, Justice Vickers rejected British Columbia's argument that the plaintiff Tsilhqot'in Nation's ancestors were at the band level of organization based partly on the lack of any pan-Tsilhqot'in decision-making institution "is not unlike the *Baker Lake* test for an 'organized society'."<sup>215</sup> "Such an approach," Vickers continues, "is weighed down with superficial value judgments about Aboriginal ways of life. The need to measure traditional Aboriginal societies against the legal ideals and institutions of a 'civilized society' has passed."<sup>216</sup>

Yet subsequent BCSC rulings in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*<sup>217</sup> and *Ahousaht*, the courts returned to an understanding of the social organization of the plaintiffs was both "required" and "necessary." In *Lax Kw'alaams*, Justice Satanove asserted, following "the principles of *R. v. Van der Peet* and *Mitchell v. M.N.R.*," that the first of six things the plaintiffs "must" prove regarding their pre-contact ancestors for an Aboriginal right was that

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<sup>213</sup> *Van der Peet* (SCC), *supra* note 1 at para 33.

<sup>214</sup> See e.g. *ibid* at para 90. Sometimes this is also phrased in the idiom of kinship—particularly in cases involving commercial or economic rights. See following.

<sup>215</sup> *Tsilhqot'in*, *supra* note 116 at paras 450, 453.

<sup>216</sup> *Ibid* at para 453. Vickers then goes on to quote Justice Hall's statement in *Calder*.

<sup>217</sup> [2008] 3 CNLR 158 [*Lax Kw'alaams* (BCSC)].

they “were members of an organized society.”<sup>218</sup> Satanove reasserted the burden of the *Baker Lake* test by stating that determining the pre-contact level of social organization of the plaintiff’s ancestors was “an element of proof of their aboriginal rights,” but also that determining it was “also important to establish the time depth of the cultural practices distinctive to the Coast Tsimshian” and that it “is required to properly contextualize the characteristics and purposes of trade practiced by them.”<sup>219</sup> Displaying the same reasoning of the neo-evolutionists in anthropology, the “features of Coast Tsimshian life” Satanove used as a basis for determining whether tribes existed prior to contact include the plaintiff’s ancestors’ seasonal round of resource extraction, and, in particular, she focused on social complexity, whether there were permanent or temporary settlement patterns, and the form of political organization.<sup>220</sup> While in *Ahousaht* Garson J. wrote, “An understanding of Nuu-chah-nulth political organization is necessary to address the question of kinship and whether trade was between independent groups or ... was primarily tribute between groups politically connected to Maquinna.”<sup>221</sup> Garson in this passage relies on the same contrast the neo-evolutionists did<sup>222</sup> between kinship and a central political authority.

This continuity between the ethnocentric evolutionary taxonomies of the nineteenth century anthropologists and positivist jurists, and the Canadian judiciary’s use of level of social organization in determining Aboriginal rights claims belie another aspect of the Court’s dispositionism. Through dispositionist assumptions, Jon Hanson argues, people form stereotypes that automatically categorize new information “that affects how people come to understand and

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<sup>218</sup> *Lax Kw’alaams* (BCSC), *supra* note 217 at para 124, *aff’d* [2010] 1 CNLR 278 (BCCA), *aff’d* [2011] 4 CNLR 346 (SCC).

<sup>219</sup> *Lax Kw’alaams* (BCSC), *supra* note 217 at paras 125-26.

<sup>220</sup> *Ibid* at paras 148-60.

<sup>221</sup> *Ahousaht*, *supra* note 7 at para 206.

<sup>222</sup> See text accompanying notes 201-202.

view certain social groups.”<sup>223</sup> For example, Hanson suggests that the notion of the “state of nature” in classic liberal political theory resulted in European settlers and colonists stereotyping Indigenous peoples as “savages,” and, as a result, an “inferior” type of human being.<sup>224</sup> These dispositionist stereotypes were then justified by attributing certain dispositional qualities to Indigenous peoples, which circularly reinforced and naturalized Indigenous peoples’ “subhuman” nature as their supposed inferiority was believed to be so obvious it was beyond debate.<sup>225</sup> And if Indigenous peoples were stereotyped as “subhuman,” and therefore less evolved/“uncivilized,” their status of living in a “society” was also questionable.

Dispositionism continues today in the courts, in spite of Justice Hall’s rejection of evolutionary interpretations, and framings of Aboriginal peoples through dispositionist stereotypes. Hall’s rejection of those “ancient concepts” was founded on the dissonance between current and past understandings of Aboriginal peoples by finding fault with the formerly held, “rudimentary and incomplete” dispositionist assumptions: “In so saying this in 1970, [Chief Justice Davey] was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before.”<sup>226</sup> “In just this way, today,” Hanson writes, “we look back with horror at ... the institutions, customs, laws, and mindsets that made it possible. We express outrage that ‘those people’ could have embraced such inappropriate dispositionist assumptions, when it is so clear, in hindsight, that those assumptions were not only wrong, but self-serving mechanisms of oppression.”<sup>227</sup> The interpretations Davey relied on that Hall rejected, were not only misguided but obviously different from contemporary understandings. Thus, we are “confident that history is not repeating itself today, confident that

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<sup>223</sup> Hanson & Yosifon, “Situational Character”, *supra* note 107 at 53, n 209.

<sup>224</sup> See e.g. *ibid* at 10-13; Hanson & Hanson, *supra* note 114 at 430-31.

<sup>225</sup> Hanson & Yosifon, “The Situation”, *supra* note 107 at 310-11.

<sup>226</sup> *Calder*, *supra* note 206 at 347.

<sup>227</sup> Hanson & Yosifon, “The Situation”, *supra* note 107 at 326.



we are not blinded too by some false dispositions.”<sup>228</sup> Yet as I have attempted to show above, while the personhood of Aboriginal peoples is no longer explicitly questioned, the categorical thought and biases that associated specific traits with a Eurocentric taxonomy of social organization, based on the same evolutionary hierarchical typology that questioned Aboriginal peoples’ humanity, continues today.

The categorical typologies of pre-contact organization of Aboriginal peoples of the Court and the related neo-evolutionary taxonomies reflects a Eurocentric belief that the world is characterized by a “unitary ontology” that assumes “that while the world is composed of varying strata of complexity that can be ordered hierarchically, underneath it all the nature of being is basically the same.”<sup>229</sup> Qualitative differences, then, as with the conception of the human person and cultural diversity, are secondary.<sup>230</sup> For example, Steward argued that those “secondary features” that are “less strongly tied” to the culture core “are determined to a greater extent by purely cultural–historical factors—by random innovations or by diffusion—and they give the appearance of outward distinctiveness to cultures with similar cores.”<sup>231</sup> I will return to the issue of distinctiveness in the next chapter, but an instance of the Eurocentric unitary ontology in the Court’s categorical thought is in their reliance on English and/or French dictionaries to fill out and define some of the categories relied on in determining Aboriginal rights. Yet the closest the Court has come to relying on an Aboriginal language dictionary, let alone acknowledging Aboriginal languages may be able to provide insights into Aboriginal rights claims, is Justice Bastarache’s mention of Barsh and Henderson’s point that there is “no precise equivalent of

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<sup>228</sup> *Ibid.*

<sup>229</sup> Gordon, *supra* note 18 at 27.

<sup>230</sup> *Ibid.*

<sup>231</sup> Steward, *Culture Change*, *supra* note 176 at 37.

European concepts of ‘culture’ in Mi’kmaq.”<sup>232</sup> With “culture” formulated as a corpus of information, knowledge often becomes viewed as analogous to dictionaries,<sup>233</sup> and the legal positivist approach to Aboriginal practices “is based on an understanding of language that assumes that words and concepts are capable of objectively capturing the meaning of events the law seeks to describe and control.”<sup>234</sup> By naturalizing dictionary definitions through the Eurocentric association of scientific knowledge with rationality, objectivity and “nature” (via the Great Divides), dictionaries are believed to provide objective and neutral definitions of the unitary nature of being.

Yet by objectifying the categories and “practices, customs and traditions” of Aboriginal rights, the unitary ontology of Eurocentrism inverts the lives of Aboriginal peoples and their ancestors. The atomization of “culture,” as alluded to above, not only separates the cultural whole into discrete elements that are then reconstituted into the whole, it also results in the belief that the cultural atoms are constituted independently of the whole.<sup>235</sup> These discrete cultural elements are then believed to be identifiable based on intrinsic, objective properties and attributes that are assumed to be constant regardless of the contexts or circumstances which then allow the grouping of a class of objects based on assumed, shared characteristics (much like with the dispositionist conception of “culture”).<sup>236</sup> We saw this above in Steward’s levels of sociocultural integration taxonomy as well as in its use in Aboriginal rights cases. In the rest of Part I this Eurocentric belief will continually resurface, but in the contexts of the Court’s

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<sup>232</sup> Barsh & Henderson, *supra* note 88 at 1002, n 30; quoted in *Sappier*, *supra* note 13 at para 44.

<sup>233</sup> Gísli Pálsson, “The virtual aquarium: Commodity fiction and cod fishing” (1998) 24 *Ecological Economics* 275 at 282.

<sup>234</sup> Henderson, *First Nations Jurisprudence*, *supra* note 75 at 192.

<sup>235</sup> See e.g. Ingold, “Two Reflections”, *supra* note 55 at 304.

<sup>236</sup> See e.g. Ingold, “The Man”, *supra* note 99 at 359; Latour, *supra* note 26 at 51.

characterization phase of the test for Aboriginal rights, there are two further issues with the Court's use of this hierarchical, evolutionary taxonomy of social organization I wish to discuss.

The first issue is particularly notable when this taxonomy is used in Aboriginal rights claims involving claimants from coastal British Columbia. Because the Eurocentric taxonomy is believed to have universal applicability due to its supposed objectivity and generality, Northwest Coast peoples are often categorized as hunter-gatherers within the taxonomy due primarily to their lack of agriculture. Yet the “hunter-gatherer” category in this taxonomy, as discussed above, are typically nomadic foragers,<sup>237</sup> with a “band” level of sociopolitical organization, with little specialization of roles and in the division of labour, and no system of food storage.<sup>238</sup> Therefore, Lamer C.J. based his dismissal of Mrs. Van der Peet's Aboriginal rights claim because he relied on the Eurocentric hunter-gatherer classification:

Finally, Scarlett Prov. Ct. J. found that the Sto:lo were at a band level of social organization rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour — for example, specialization in the gathering and trade of fish — whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Sto:lo culture. I would note here as well Scarlett Prov. Ct. J.'s finding that the Sto:lo did not have the means for preserving fish for extended periods of time, something which is also suggestive that the exchange or trade of fish was not central to the Sto:lo way of life.<sup>239</sup>

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<sup>237</sup> The issue of nomadism and Aboriginal rights—particularly title—also reflects the implicit use of the Eurocentric hierarchical social organization taxonomy. See e.g. in *R v Marshall*; *R v Bernard*, [2005] 2 SCR 220 at para 66 where the Court discusses the issue of whether or not a nomadic or semi-nomadic peoples can ever make a claim to title of “aboriginal land.” The fact that how nomadic a people are (or that they subsist by hunting) is a continuing topic of concern, regardless of whether or not there has been some shift in granting title to nomadic peoples, highlights the connection between title, sedentariness, and, as a result, agriculture.

<sup>238</sup> The lack of food storage amongst hunter-gatherers and suggestions for the reasons why is often traced, in anthropology at least, to Marshall Sahlins' influential essay “The Original Affluent Society” that was revised and published in his book *Stone Age Economics* (Chicago: Aldine-Atherton, 1972). Note, in particular, at 30-32. *Contra* James Woodburn, “Egalitarian Societies” (1982) 17 Man 431.

<sup>239</sup> *Van der Peet* (SCC), *supra* note 1 at para 90. Lamer's final point in this passage is ironic given his position that Aboriginal rights must take into account the Aboriginal perspective, as Scarlett Prov Ct J based this finding of a lack

The pre-contact Aboriginal peoples of coastal British Columbia, though, had a tripartite system of social stratification based on wealth and hereditary, had permanent settlements (though mainly occupied in winter) that included monumental architecture and relatively large populations, a sense of residency and resource site ownership, and some specialization and division of labour, but relied, primarily, on fishing and gathering.<sup>240</sup> In other words, when classified according to subsistence methods, the pre-contact Aboriginal peoples of coastal British Columbia are “hunter-gatherers” or “foragers,” but when classified according to sociopolitical organization they have more of a “tribal” (or higher) level of organization. As a result, the peoples of the Northwest Coast, in Eurocentric anthropological literature, are often referred to as “exceptional” or “complex” hunter-gatherers.<sup>241</sup> If these Aboriginal peoples do not fit these Eurocentric typologies, thereby bringing the typologies into question, the Court’s continuing reliance on categorical thought founded on them<sup>242</sup> to determine the scope of Aboriginal rights is surely inappropriate and illegitimate. Moreover, does the reliance on Eurocentric taxonomies, rather than Aboriginal taxonomies, practices, customs and traditions (i.e., legal systems), based on sociopolitical organization and/or subsistence with their associated traits not contradict with Lamer’s assertion that the scope and content of Aboriginal rights are Aboriginal and “must be

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of food preservation on a lack of salt (*R v Vanderpeet*, [1991] 3 CNLR 155 at 160 (Prov Ct))—suggesting that salt is the only way to preserve food. Compare with the discussion of the preservation of salmon in *Lax Kw’alaams* (BCSC), *supra* note 217 at paras 257-59.

<sup>240</sup> See e.g. Wayne Suttles, “Introduction” in Wayne Suttles, ed, *Handbook of North American Indians*, vol 7 (Washington: Smithsonian Institution, 1990) 1; Leland Donald, “The Northwest Coast as a Study Area: Natural, Prehistoric, and Ethnographic Issues” in RG Matson, Gary Coupland & Quentin Mackie, eds, *Emerging from the Mist: Studies in Northwest Coast Culture History* (Vancouver: UBC Press, 2003) 289 at 297-98; Douglas Deur & Nancy J Turner, “Introduction: Reconstructing Indigenous Resource Management, Reconstructing the History of an Idea” in Douglas Deur & Nancy J Turner, eds, *Keeping it Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Vancouver: UBC Press, 2005) 3 at 26.

<sup>241</sup> See e.g. *ibid* at 26-27; Bruce D Smith, “Low-Level Food Production and the Northwest Coast” in Douglas Deur & Nancy J Turner, eds, *Keeping it Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Vancouver: UBC Press, 2005) 37; Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 31-32.

<sup>242</sup> As we saw above in *Lax Kw’alaams* and *Ahousaht*. See text accompanying notes 217-220.

determined on a case-by-case basis”?<sup>243</sup> Surely if Aboriginal rights are to be determined on a case-by-case basis, should not the characterization of the claim also proceed in the same manner and not based on prior background assumptions and associations.

The other issue involves the technocratic nature of the unitary ontology of Eurocentric thought and the particular taxonomies we are concerned with here. Another implication of the second, external Great Divide and the Eurocentric mobilization of “Nature” discussed above,<sup>244</sup> is that the assumptions, ontology and epistemology of science and Eurocentrism fade to the background, “unstudied, unstudiable, miraculously conflated with Nature itself.”<sup>245</sup> As a result, the highest level in the Eurocentric evolutionary taxonomy is, for the most part, rarely explored in any depth, unlike the other levels in the taxonomy.

The logic behind the traits associated with the Eurocentric category of “hunter-gatherer” is also self-reinforcing<sup>246</sup> and remains founded on the background assumption of the Great Divides placing “Them” “closer” to nature: because peoples classified as hunter-gatherers are reliant on the “vagaries” of nature, they must be nomadic, moving with the (often seasonal) availability of resources; because they are nomadic, these people are not able to maintain large populations, accumulate goods (particularly items of wealth) or make claims of ownership to land; because they have relatively low populations, their sociopolitical organization is based on the family, is more egalitarian, and there are not enough people (or time) for role specialization; because they are centred around the family, economic exchange is small scale and based more on reciprocity; because they are not able to accumulate goods, this too contributes to equality in

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<sup>243</sup> *Van der Peet (SCC)*, *supra* note 1 at para 69.

<sup>244</sup> See text accompanying note 39.

<sup>245</sup> Latour, *supra* note 26 at 97; Gordon, *supra* note 18 at 22-23.

<sup>246</sup> Particularly in an evolutionary sense in which higher levels are considered to be an increasing realization of the human capacity to reason—particularly through its manifestation in agriculture and scientific knowledge—as discussed in the following.

these groups and lack of political organization, as well as the lack (or need) for food storage, and so on. As we saw above, though, this all changes with the development of agriculture in particular. Thus we have a dichotomy between hunting and gathering versus agriculture in which the boundary between the two is transformed into a thin line (a group of people is either one or the other) and crossing the boundary only goes in one direction,<sup>247</sup> reinforcing the unilineal ascendancy and transcendence of rationality. Aboriginal peoples, then, are not only “Them,” but are a mirror, reflecting glimpses of the various stages in the history of the Eurocentric drive towards rationality.<sup>248</sup>

Yet how do we reconcile these supposed traits of pre-existing hunting and gathering Aboriginal peoples with the “simple fact” for the existence of the doctrine of Aboriginal rights? How can we reconcile the nomadism and resulting correlates with the “simple fact” that “*when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries*”?<sup>249</sup> If Europeans arrived in North America and Aboriginal peoples were already here, who are the nomadic people? What differentiates the nomadism of hunter-gatherers from the nomadism of European colonial expansion and settlement?

In contrast to the Eurocentric belief in the settledness of agriculturalists and the unsettledness of hunter-gatherers, Hugh Brody argues that in fact the opposite is true:

Farmers appear to be settled, and hunters to be wanderers. Yet a look at how ways of life take shape across many generations reveals that it is the agriculturalists, with their commitment to specific farms and large numbers of

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<sup>247</sup> Smith, *supra* note 241 at 40-41.

<sup>248</sup> Note yet again how we can see how “nature” plays two different roles in the Great Divides: on the one hand “nature” serves to distinguish “Us” from “Them” and foraging from agriculture (among a myriad of other oppositions) based on the opposition of rationality and nature. On the other hand, “nature” serves to maintain the continuity of both the human species as well as the past with the present.

<sup>249</sup> Van der Peet (SCC), *supra* note 1 at para 30 [underlining in original, emphasis added].

children, who are forced to keep moving, resettling, colonising new lands. Hunter-gatherers, with their reliance on a single area, are profoundly settled.<sup>250</sup>

Thus, the Eurocentric hierarchical evolutionary taxonomies that ground the Court's categorical approach to Aboriginal rights not only depends on the specific criteria used to distinguish the categories (i.e., subsistence versus social organization), it also, perhaps most importantly, implicitly maintains a false opposition between "traditional" Aboriginal peoples and "modern" Eurocentric culture and society that is based on the ethnocentric, unilineal evolutionary dichotomy between the civilized and the uncivilized/primitive.<sup>251</sup> In other words, though the Court has rejected the "ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species,"<sup>252</sup> the continuing dispositional biases of the Court, particularly in the characterization phase, has resulted in history continuing to repeat itself: the language may have changed, but the assumptions remain operational.

The characterization phase of the test for Aboriginal rights is then a product of a particular conception of personhood that allows the individual, "culture," and "society" to be atomized into discrete elements arranged in a hierarchical taxonomy through an inversion of life. And because the parts determine the whole, the individual, "culture," and "society" become interchangeable. Characterizing the pre-contact ancestors of contemporary Aboriginal claimants through the categories produced in creating those taxonomies and typologies are a continuation of the opposition of the state of nature with the state of society and the uncivilized with the civilized. And due to the unitary ontology of Eurocentrism that separates knowing from being,

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<sup>250</sup> *Supra* note 37 at 90.

<sup>251</sup> See also Henderson, *First Nations Jurisprudence*, *supra* note 75 at 203.

<sup>252</sup> *Calder*, *supra* note 206 at 346.

the Court looks to the pre-contact culture to ground Aboriginal rights as that is where it is believed difference arises/appears. As a result, once the Court has characterized the claim they move into the next phase of their test for Aboriginal rights: determining whether the objectified practice, custom or tradition is both integral to and distinctive of the claimant's ancestor's pre-contact culture that has been rendered fundamentally lifeless.



# 3

## The Distinctiveness of “Culture” & Aboriginal Rights

The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is *not* that it be *distinct* to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is *distinctive*. A tradition or custom that is *distinct* is one that is unique — “different in kind or quality; unlike” (*Concise Oxford Dictionary, supra*). A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is *distinctive* — “distinguishing, characteristic” — makes a claim that is not relative; the claim is rather one about the culture’s own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture *what it is*, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture. The person or community claiming the existence of an aboriginal right protected by s. 35(1) need only show that the particular practice, custom or tradition which it is claiming to be an aboriginal right is distinctive, not that it is distinct.

That the standard an aboriginal community must meet is distinctiveness, not distinctness, arises from the recognition in *Sparrow, supra*, of an aboriginal right to fish for food. Certainly no aboriginal group in Canada could claim that its culture is “distinct” or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world. What the Musqueam claimed in *Sparrow, supra*, was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a *distinctive part* of that culture. Since it was so it constituted an aboriginal right under s. 35(1).

*per* Lamer C.J.<sup>1</sup>

In the last chapter we explored some of the reasons why Aboriginal rights are founded on culture and not society. They cannot be based on “society” as, following the Court’s logic, that would result in Aboriginal rights being cast in terms that are too broad. “Society,” going all the way back to Thomas Hobbes,<sup>2</sup> is a construct of social relationships and associations. While Hobbes

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<sup>1</sup> *R v Van der Peet*, [1996] 2 SCR 507 at paras 71-72 [*Van der Peet*] [emphasis in original].

<sup>2</sup> *Leviathan* (New York: Penguin Books, 1968).

used the term,<sup>3</sup> as did the nineteenth century positivists, to make an internal distinction among human groups, it has been increasingly difficult to limit “society” to the human species as a result of research in the biological sciences.<sup>4</sup> Thus, while the formulation of the term still maintains a species specificity, it can no longer be held to distinguish humans from non-humans. The animal plus conception of the human person, on the other hand, holds that “culture” makes the human species unique among all animal species and, as we saw in the last chapter, “culture” has continually over time allowed a means to make distinctions within the *Homo sapiens* species.

We began to see this role of the idea of “culture” in the last chapter. But once the Court has determined how the right being claimed should be characterized, the next phase of the test for Aboriginal rights involves the Court determining whether the discrete, objectified practice, custom or tradition is both integral to the pre-contact culture of the claimant’s ancestors and whether it “truly made the society what it was.”<sup>5</sup> By focusing the test for Aboriginal rights on that which made the claimant’s ancestors’ culture “what it was” again highlights the Court’s atomism: “The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted.”<sup>6</sup> And while L’Heureux-Dubé J. goes on from this point to criticize Chief Justice

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<sup>3</sup> Two significant instances of Hobbes’ use of “society” for the concerns of this thesis are: *ibid* at 186 (“In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short”) and 188 (“To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. ... Justice, and Injustice are none of the Faculties neither of the Body, nor Mind. If they were, they might be in a man that were alone in the world, as well as his Senses, and Passions. They are Qualities, that relate to men in Society, not in Solitude”).

<sup>4</sup> See, for example, Edward O Wilson, *Sociobiology: The New Synthesis* (Cambridge, MA: Harvard University Press, 1975) at 7.

<sup>5</sup> *Van der Peet*, *supra* note 1 at para 55 [emphasis in original deleted].

<sup>6</sup> *Ibid* at para 150.

Lamer's integral to a distinctive culture test,<sup>7</sup> she too maintains many, if not all, of the background assumptions and biases which produce contradictions in the alternative approach she proposes.<sup>8</sup>

In this second chapter of Part I, I will continue the analysis began in the last chapter by looking at how the Eurocentric conception of personhood, and the resulting atomism, dispositionism and logic of inversion permeates the second phase of the test for Aboriginal rights known as the "integral to the distinctive culture" test. Once the Court has characterized the claim, they then must determine whether or not the practice, custom or tradition makes the pre-contact culture of the claimant's ancestors "what it is." Thus, this chapter will first explore the Court's approach to the idea of "distinctiveness" and the contrast Lamer C.J. draws between it and "distinct." Reflecting the Court's approach, the next section will then focus on the issue of integrality: "The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture."<sup>9</sup> Both the "distinctive" and "integral" standards reflects Lamer's position that "identifying those practices, customs and traditions that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans."<sup>10</sup> In this passage one can see Lamer's belief that practices, customs and traditions translate into "culture" which, in turn, translates into "society." Finally, although Lamer acknowledges that one of the factors the Court must consider in determining Aboriginal rights claims is the

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<sup>7</sup> "Further, on this view, what makes aboriginal culture distinctive is that which differentiates it from non-aboriginal culture.... Accordingly, if an activity is integral to a culture other than that of aboriginal people, it cannot be part of aboriginal people's distinctive culture." *Ibid.*

<sup>8</sup> See e.g. Chilwin Chienhan Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997) 55 UT Fac L Rev 419 at 431.

<sup>9</sup> *Van der Peet*, *supra* note 1 at para 55.

<sup>10</sup> *Ibid* at para 45.

Aboriginal perspective—in fact it is the first one he mentions<sup>11</sup>—this perspective is relegated to the final phase of the test (discussed in the next chapter). In the final section of this chapter I will explore reasons for why the characterization and integral to a distinctive culture phases serve to marginalize the Aboriginal perspective or, as Sákéj Henderson has argued, “reinvents Canadian law as integral to Aboriginal law.”<sup>12</sup>

## **I. The Distinctiveness of Aboriginal Rights**

One of the first times Chief Justice Lamer explains the reason for the special constitutional status of Aboriginal peoples he suggests that Aboriginal rights “arise from the fact that aboriginal peoples are aboriginal.”<sup>13</sup> Such a use of the word “aboriginal” represents a third way in which Lamer uses the word in *R. v. Van der Peet*. The three uses occur in a progression that seemingly links this grounding of Aboriginal rights in biology to the founding of the test on “culture.” Thus, when Lamer explains the existence of the doctrine of Aboriginal rights he grounds it in “one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”<sup>14</sup> Lamer then uses the idea of “tradition”<sup>15</sup> to connect this prior occupation to the “aboriginalness” (or, as in *Delgamuukw v. British Columbia*, “Indianness”<sup>16</sup>) of Aboriginal peoples. Aboriginality, as in Lamer’s definition of “tradition,” becomes converted into a property that can be transmitted separate from people’s actual lives.<sup>17</sup>

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<sup>11</sup> *Ibid* at para 49.

<sup>12</sup> James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006) at 203.

<sup>13</sup> *Van der Peet*, *supra* note 1 at para 19 [underlining in original].

<sup>14</sup> *Ibid* at para 30 [underlining in original].

<sup>15</sup> *Ibid* at para 40.

<sup>16</sup> [1997] 3 SCR 1010 (SCC) [*Delgamuukw* (SCC)]. See, for example, at para 181.

<sup>17</sup> See e.g. Tim Ingold, *The Perception of the Environment: Essays in livelihood, dwelling and skill* (London: Routledge, 2000) at 132 [Ingold, *Perception*].

The two Great Divides are at work again in which Aboriginal rights exist due to the transmission of biological material and prior occupation that has been converted into part of the cultural heritage of a particular peoples. Thus, instead of people inhabiting the world,<sup>18</sup> they live *on* the land while, at the same time, participating *in* distinctive cultures. In other words, “nature” becomes formulated as a surface upon which communities exist, and because “culture” is divorced from nature, the actual lives of Aboriginal peoples occupy the thin space between the surface of the earth that they live on and the world of culture in which they participate in.<sup>19</sup> Like the human person in Eurocentric thought, then, land is seen as “topped up” or “covered over” with “cultures.” Again, this idea of living *on* the land reflects the first, internal Great Divide, as to live *on* the land entails a detachment from nature and as we saw in the last chapter, in Eurocentric thought the human species alone broke through the confines of “nature” and are thus detached from it due to “Culture.”<sup>20</sup>

We then see the work of the second, external Great Divide in Chief Justice Lamer’s “simple fact”: it is not living on the land that was distinctive for Aboriginal peoples, rather their distinctiveness lies in their “cultures.” And even when Lamer specifies that s. 35(1) of the *Constitution Act, 1982*<sup>21</sup> provides “the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies,” that distinctiveness is a product of those societies having “their own practices, traditions and cultures.”<sup>22</sup> This again reflects the unitary

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<sup>18</sup> I will discuss this idea of “inhabiting the world” further in chapter 5.

<sup>19</sup> *Ibid* at 213-14, Tim Ingold, *Being Alive: Essays on Movement, Knowledge and Description* (New York: Routledge, 2011) at 71.

<sup>20</sup> See e.g. Ingold, *Perception*, *supra* note 17 at 135.

<sup>21</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>22</sup> *Van der Peet*, *supra* note 1 at para 31.

ontology of Eurocentrism discussed in the last chapter where diversity and difference are secondary qualities of a common, universal “nature.”<sup>23</sup>

The use of “community” in Chief Justice Lamer’s “simple fact,” and not “society,” is analogous to this unitary ontology. Recall in the last chapter I discussed how the logic of inversion converts peoples’ lives and experiences into a boundary between “Us” and “Them.” A result of this is that each category becomes homogenized with difference being pushed to the boundaries: “We are all the same, by virtue of our contrast with *them*.”<sup>24</sup> Each category becomes discrete, and is united and identifiable by a set of properties or attributes that are intrinsic to it.<sup>25</sup> And because of the underlying unitary ontology of the Eurocentric human person and the second, external Great Divide, as we have been discussing, humans are believed to differ based on cultural differences. Thus differences in lives and experiences become rendered in the language of diversity: “That is what the ‘diversity of human culture’ really amounts to; the variety of different ways in which human beings choose to cut up continuities of their animal experience.”<sup>26</sup>

“Community” differs from both “culture” and “society,” as both “culture” and “society,” while considered discrete and internally homogenous, are terms signifying abstract and metaphysical difference. “Community,” on the other hand, is an “aggregating device” that

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<sup>23</sup> See e.g. Deborah Gordon, “Tenacious Assumptions in Western Medicine” in Margaret Lock & Deborah Gordon, eds, *Biomedicine Examined* (London: Kluwer Academic Publishers, 1988) 19 at 27. An example of this discussed in the last chapter was in Julian Steward’s notion of culture core: “Innumerable other features may have great potential variability because they are less strongly tied to the core. These latter, or secondary features, are determined to a greater extent by purely cultural-historical factors—by random innovations or by diffusion—and they give the appearance of outward distinctiveness to cultures with similar cores.” Julian H Steward, *Theory of Culture Change: the methodology of multilineal evolution* (Chicago: University of Illinois Press, 1955) at 37.

<sup>24</sup> Tim Ingold, “The Art of Translation in a Continuous World” in Gísli Pálsson, ed, *Beyond Boundaries: Understanding, Translation, and Anthropological Discourse* (Oxford: Berg, 1993) 210 at 228 [Ingold, “Art of Translation”] [emphasis in original].

<sup>25</sup> Tim Ingold, “The Man in the Machine and the Self-Builder” (2010) 35 *Interdisciplinary Science Reviews* 353 at 359 [Ingold, “The Man”], *Perception*, *supra* note 17 at 138.

<sup>26</sup> Edmund Leach, *Social Anthropology* (Oxford: Oxford University Press, 1982) at 98; Ingold, “The Man”, *supra* note 25 at 359.

sustains diversity while also expressing commonality.<sup>27</sup> Thus, the doctrine of Aboriginal rights exists because of *communities* living on the land. “Community,” then, is about shared lives and the relationships that are inherent in that commonality.<sup>28</sup> Yet as Lamer C.J. suggests, distinctiveness lies not in life on the land, as such communal living does not distinguish between human groups nor is it limited to the human species, but through the inversion of Aboriginal peoples’ lives into societies and cultures. We also see this dissociation of community and distinctiveness in *R. v. Sappier; R. v. Gray*: “It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community.”<sup>29</sup> While this passage from *Sappier* seems to contradict my argument about the lifelessness of the Court’s approach to Aboriginal rights we can begin to see what I will argue further in the next chapter: Bastarache J. suggests that a *community* has a distinctive life and, as a result, reproduces the same inversion that the Court does with the concept of “culture” in particular. Moreover, it evinces that hierarchical model of culture discussed in the last chapter where “society” is comprised of “cultures” which are comprised of practices, customs and traditions: “The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community.”<sup>30</sup>

The idea of “distinctiveness” also adds another level to this hierarchical model of “culture,” and therefore Aboriginal rights, as anthropologist Michael Asch has argued that by

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<sup>27</sup> Nigel Rapport & Joanna Overing, *Social and Cultural Anthropology: The Key Concepts*, 2d ed (London: Routledge, 2007) at 74-75, 377; Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, revised ed (New York: Oxford University Press, 1983) at 75-76.

<sup>28</sup> See e.g. *ibid* at 75.

<sup>29</sup> [2006] 2 SCR 686 at para 22 [*Sappier*] [emphasis in original].

<sup>30</sup> *Ibid*.

using the term “distinctive” the “Court is likely attempting to discover a method to differentiate between what is central and what is peripheral to a culture.”<sup>31</sup> In other words, some practices, customs and traditions are more “important” as they are “one of the things that truly made the society what it was,” while others, such as eating to survive, are not distinctive, or are incidental or occasional.<sup>32</sup> Thus, instead of distinctiveness arising from a relational meshwork of unified individuals living together, it is inverted via the first, internal Great Divide to an abstract and metaphysical realm of culture that is then fragmented through the second, external Divide into discrete “cultural” entities that are rendered “distinctive” due to the attributes or traits each entity possess. Differences in food, dress, customs etc, then, are inverted—as well as dispositionalized—into cultural differences.<sup>33</sup>

This discussion of distinctiveness implies a comparative perspective though. And Chief Justice Lamer went to pains to argue that his use of the term did not have such a high threshold by distinguishing “distinctive” from “distinct”—as seen in the epigraph to this chapter. Yet this attempt by Lamer at lexical clarity or specificity is fallacious. While “distinct” is, as Lamer defines it, a difference in kind, his definition of “distinctive” appears to render it as a difference in degree. Yet as we saw in the discussion of personhood in chapter 2, this only serves to redraw the boundary in a different place, as both involve cultural difference and therefore, contra Lamer, *both* are relative. In fact, the conception of “culture” as a discrete, bounded entity is a necessarily comparative conception. The idea that “*a* culture” has essential practices, customs and traditions that make it distinctive and “what it is” is a classificatory activity where differences in lives are

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<sup>31</sup> “The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*” (2000) 5 Rev Const Stud 119 at 129.

<sup>32</sup> *Van der Peet*, *supra* note 1 at paras 55-56 [underlining in original].

<sup>33</sup> The dispositionalizing of these different aspects of life into cultural differences will become important in the next chapter when I discuss the doctrine of logical evolution and the issue of European influence.



inverted into cultural differences construed within a comparative project.<sup>34</sup> Individuals are again pushed to the background rendering Aboriginal rights lifeless and in need of translation—both temporally and cross-culturally (as I will discuss in the next chapter).

The idea of “distinctive culture” then, is again founded on the assumption of biological continuity produced by the first Great Divide, but through the second Divide “distinctive” comes to mean *discontinuity*.<sup>35</sup> Moreover, Lamer’s conception of “distinctive” serves to transform it into a cultural trait like fishing for food or trading salmon. Thus, the doctrine of Aboriginal rights translates cultural difference into legal difference—much like what the nineteenth century positivist jurists sought to do.<sup>36</sup>

## **II. The Integrality of Distinctiveness**

Alas, not all traits of a culture are equal in the doctrine of Aboriginal rights. By defining distinctive as “characteristic” and establishing it as the standard for constitutional protection, Lamer C.J. transforms certain practices, customs and traditions into the defining features of the claimants’ and their pre-contact ancestors’ “culture” resulting in a hierarchical model. Again, this is a product of the atomism of Eurocentrism where the parts constitute the culture whole. But because the focus of the test for Aboriginal rights is on distinctive cultures and societies, not all practice, custom or tradition elements contribute to that distinctiveness. Thus it is believed that a “distinctive culture” is a result of a few practices, customs and traditions that are of central significance and integral to making that culture “what it is,” implying that there are other practices, customs and traditions in a “distinctive culture” that are “incidental” and not integral:

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<sup>34</sup> See e.g. Ingold, *Perception*, *supra* note 17 at 138, “Art of Translation”, *supra* note 24 at 228.

<sup>35</sup> See e.g. Ingold, *Perception*, *supra* note 17 at 217.

<sup>36</sup> Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 Harv Int’l LJ 1 at 26.

The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not.<sup>37</sup>

In this, then, we see the essentialism of the Court's approach to culture where certain, integral practices, customs and traditions are converted from their lived contexts into intrinsic properties of a homogenized, metaphysical "culture."

Chief Justice Lamer attempted to assist future courts on how to determine integrality by suggesting that a "practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question."<sup>38</sup> It is interesting that Lamer refers to this as a "problem" given that it is only a problem due to his reliance on Eurocentric thought! In *Mitchell v. M.N.R.* Chief Justice McLachlin developed Lamer's notion of integrality by further entrenching the idea that specific practices, customs and traditions can be taken as representing "a culture's" intrinsic properties (and thereby further restricting which activities can qualify for protection as well as raising the burden of proof):

The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet, supra*, at paras. 54-59 (emphasis in original)).<sup>39</sup>

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<sup>37</sup> *Van der Peet, supra* note 1 at para 70. Note how there is no mention of culture in this passage, again highlighting the parts-whole relationship I have been discussing in Part I of this thesis.

<sup>38</sup> *Ibid* at para 59.

<sup>39</sup> [2001] 1 SCR 911 at para 12 [*Mitchell*].

And although McLachlin notes later in *Mitchell* that the claimed right must not be “artificially broadened nor narrowed,”<sup>40</sup> citing *R. v. Pamajewon*,<sup>41</sup> her elaboration of what integrality means appears related to her dissenting opinion in *Van der Peet* where she criticized what she felt was the “overbreadth” of Lamer’s approach: “While the Chief Justice in the latter part of his reasons seems to equate ‘integral’ with ‘not incidental’, the fact remains that ‘integral’ is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did.”<sup>42</sup> In this, and in the rest of this paragraph from McLachlin’s dissent, her criticism of overbreadth is based on a denial of “culture” being a holistic meshwork and, as a result, her approach is as lifeless as Lamer’s.

The notion of “core identity” was discarded by Bastarache J. in *Sappier*, where he suggests that it “may have unintentionally resulted in a heightened threshold for establishing an aboriginal right,” adding that the “core” standard “has never been the test for establishing an aboriginal right.”<sup>43</sup> Bastarache also repudiated the “fundamentally altered” and “defining feature” standards by suggesting that they “also served in some cases to create artificial barriers to the recognition and affirmation of aboriginal rights.”<sup>44</sup> Bastarache provides an example of this from the trial level rulings in *Sappier* where the trial judge “concluded that Maliseet culture

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<sup>40</sup> *Ibid* at para 15.

<sup>41</sup> [1996] 2 SCR 821.

<sup>42</sup> *Van der Peet*, *supra* note 1 at para 256. Justice L’Heureux-Dubé also suggests in her *Van der Peet* dissent that to meet the integral standard the practice, custom or tradition must be “core”: “Put another way, the aboriginal practices, traditions and customs which form the core of the lives of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1).” *Ibid* at para 161. While more in harmony with the trans-systemic framework I will propose in chapter 5, the portrayal/use of “life” by L’Heureux-Dubé remains firmly entrenched in the Eurocentric assumptions I have been discussing.

<sup>43</sup> *Sappier*, *supra* note 29 at para 40.

<sup>44</sup> *Ibid* at para 41.

would not have been fundamentally altered had wood not been available to it. In his opinion, '[t]he society would in all probability have used some other available material' (p. 13)."<sup>45</sup>

In addition to the ridiculousness of the trial judge's position, which Bastarache rejected, it is symptomatic of the general Eurocentric assumptions that permeate the doctrine of Aboriginal rights. To begin with, there are no individuals in the conclusion: it is Maliseet culture that wood was available to, and Maliseet society that used the wood. Moreover, we see the separation of culture from nature, as changes or variations in the latter are presumed to not really affect the former in a significant way. Yet is this not similar to Bastarache's suggestion "that there is no such thing as an aboriginal right to sustenance" but, rather, only for "the traditional *means* of sustenance"?<sup>46</sup>

It is the inversion of life and individuals into "societies" and "cultures" that are essentialized into a few intrinsic, integral practices, customs and traditions that not only causes problems for the Court but also serves to narrow and restrict the constitutionally entrenched rights of Aboriginal peoples. For example, Chilwen Cheng has asserted that the integral and distinctive standards have narrowed what cultural practices mean for the Court, limiting any attempt for a right to self-government or sovereignty, pointing out that it would be difficult to prove to the Court's satisfaction that a particular people's conception of sovereignty is distinctive relative to other groups' conceptions.<sup>47</sup> Moreover, the atomism inherent in this "integral to a distinctive culture" test is an instance of what Asch has referred to as "ethnocentric logic."<sup>48</sup> Similar to what I have been discussing, the test for Aboriginal rights is based on "culture" as being a collection of elements and "that there is a relationship between the existence of an

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<sup>45</sup> *Ibid* [alteration in original].

<sup>46</sup> *Ibid* at para 37 [emphasis in original].

<sup>47</sup> Cheng, *supra* note 8 at 431-32.

<sup>48</sup> *Supra* note 31 at 130.

institution and its centrality to a culture”—a view that contemporary anthropology has clearly shown is not applicable cross-culturally.<sup>49</sup>

Similarly, Henderson has also pointed out that this atomistic, hierarchical model of culture—where some practices, customs and traditions are deemed integral while others only incidental—“presumes that cultural elements or practices can exist independently of one another, so that the loss of one element does not compromise the perpetuation or enjoyment of the others.”<sup>50</sup> Seeing as atomism pervades biomedicine as well, the “integral” approach to culture by the Court is analogous to suggesting that since the elbow is incidental to grasping an object with one’s hand, that one can lose their elbow without losing any ability to pick things up! Supposedly “incidental” activities, then, can be left unprotected and exposed, regardless of s. 35(1), as they contribute “nothing” (following this Eurocentric reasoning) to the distinctiveness of the lives of a particular Aboriginal peoples.<sup>51</sup> Moreover, Henderson argues that this approach is similar to the opposition of the primitive and the civilized in colonial jurisprudence and, as a result, “can be seen as the persistent manifestation of those false premises.”<sup>52</sup>

Thus, as Justice L’Heureux-Dubé pointed out in her criticism of the integral to a distinctive culture approach in *Van der Peet*, the test for Aboriginal rights is “based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs [that] literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away.”<sup>53</sup> In other words, like the two Great Divides and how they end up pushing “Them”—Indigenous peoples—away based on their

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<sup>49</sup> *Ibid.* See too Russel Lawrence Barsh & James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 McGill LJ 993 at 1000-01.

<sup>50</sup> *Supra* note 12 at 208.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Van der Peet*, *supra* note 1 at paras 151-54.

“distance” from the standards of Eurocentric scientific thought and rationality discussed in the last chapter, by defining Aboriginal rights based on objectified practices, customs and traditions they become calculated in terms of their distance from non-Aboriginal practices, customs and traditions: “It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).”<sup>54</sup> “[T]he more ‘different,’” then, “the more ‘right.’”<sup>55</sup>

The integral to a distinctive culture standard then involves “an assessment of the value of certain practices as against others, as interpreted within a particular political relationship.”<sup>56</sup> As a result, when practices, customs or traditions challenge dominant world views, disrupts resource allocations, or conflicts with the rights or greater good of the broader social, political and economic Canadian community and society, claims to Aboriginal rights receive greater scrutiny.<sup>57</sup> For example, the degree of scrutiny that the Crown’s fiduciary duty requires of an infringing measure or action “is a function of the nature of the aboriginal right at issue. The distinction between *Sparrow* and *Gladstone*, for example, turned on whether the right amounted to the exclusive use of a resource, which in turn was a function of whether the right had an internal limit.”<sup>58</sup> Another example comes from *Ahousaht Indian Band v. Canada (AG)* where, in attempting to determine whether the claimants have an Aboriginal right to sell fish on a commercial basis, Justice Garson stated that “other aspects of the Nuuchah-nulth way of life”—

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<sup>54</sup> *Ibid* at para 56; Gaynor Macdonald, “Does ‘culture’ have ‘history’?: Thinking about continuity and change in central New South Wales” (2001) 25 *Aboriginal History* 176 at 194.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> See e.g. Jennifer Sepez, “Treaty Rights and the Right to Culture: Native American Subsistence Issues in US Law” (2002) 14 *Cultural Dynamics* 143 at 150.

<sup>58</sup> *Delgamuukw* (SCC), *supra* note 16 at para 163. We see in this Henderson’s point that “fiduciary” “is inherently ambiguous and two-edged.” *Supra* note 12 at 210. Unfortunately it appears that the Court, through the integrality test, choose the view of fiduciary that is paternalistic and perpetuates the same justifications used during the colonial period: “This fiduciary’s freedom to share Aboriginal nations’ traditional resources with the broader community flows logically from the principle in *Van der Peet* that all Aboriginal rights must be ‘reconciled’ with the imported legal system, and thereby with the self-interest of non-Aboriginal people.” *Ibid* at 210-11.

including such things as their pre-contact dependency on fish, political organization, and warfare and raiding—needed to be looked at in addition to the written record even though some of these aspects were not even disputed in the case.<sup>59</sup> Through inversion, atomism and dispositionism, then, the Court is provided with further opportunities to restrict and deny Aboriginal rights claims—as we will continue to see. Once more we find the Eurocentric conception of culture lurking in the background, unacknowledged and unquestioned.

This calculation within particular political relationships, though, is problematic as it is based on projecting the contemporary onto the pre-contact. If the right is characterized based on pre-contact practices, customs and traditions that are integral to the claimant's ancestors, then the political relationships prior to contact should be the standard. In other words, "Canadian society" should have no influence at this point of the test, and its use here results in "Canadian society," which also did not exist until well after contact, and Canadian law becoming integral to Aboriginal law and rights.<sup>60</sup> Yet what of the Aboriginal perspective? If the first two phases of the test for Aboriginal rights focuses on the integral practices, customs and traditions of the distinctive pre-contact cultures and societies of Aboriginal claimants, and if the entire written record is produced post-contact, how has the Court been able to not rely *solely* on the Aboriginal perspective? Moreover, if we accept Chief Justice Lamer's assertion that "distinctive" is not a claim relative to other cultures and objectified practices, customs and traditions, it *is*, implicitly, a claim to an internal Aboriginal perspective "that this tradition or custom makes the culture what it is"<sup>61</sup> and what it was.

### **III. Neutralizing the Aboriginal Perspective**

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<sup>59</sup> [2010] 1 CNLR 1 at paras 197, 202, 206, 229-30.

<sup>60</sup> See e.g. Henderson, *supra* note 12 at 203.

<sup>61</sup> *Van der Peet*, *supra* note 1 at para 71.

Throughout Justice L'Heureux-Dubé's alternate approach to Aboriginal rights she emphasizes the centrality of the Aboriginal perspective: "The foregoing discussion shows that the 'frozen right' approach to defining aboriginal rights as to their nature and extent involves several important restrictions and disadvantages. A better position, in my view, would be evolutive in character and give weight to the perspective of aboriginal people."<sup>62</sup> As mentioned earlier, Lamer C.J. does acknowledge that the Aboriginal perspective must be taken into account,<sup>63</sup> but he relegates it to the final phase of the test. In addition to that already mentioned, Justice McLachlin points out a further way in which Lamer fails to consider the Aboriginal perspective: "To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that *different people may entertain different ideas of what is distinctive, specific or central.*"<sup>64</sup> This reflects a "fundamental issue" with this phase of the test for Aboriginal rights according to Henderson: "the disguised identity of the decision-maker."<sup>65</sup> In this final section of chapter 3 I will explore how Lamer's failure to consider the Aboriginal perspective until the final stages of the test is, in fact, fitting with the Eurocentric assumptions and biases that permeate the Court's approach (even in dissent) to Aboriginal rights, thereby serving to reaffirm a power asymmetry.

Henderson continues his criticism of the *Van der Peet* test by asserting that because the "courts of the colonizer have assumed the authority to define the nature and meaning of Aboriginal cultures" European paternalism becomes entrenched.<sup>66</sup> Yet it is in the nature of testing that conceals a power asymmetry that is created by the second, external Great Divide between "Us" and "Them." Because the Court's test is based on the naturalization of "Culture,"

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<sup>62</sup> *Van der Peet*, *supra* note 1 at para 171.

<sup>63</sup> *Ibid* at para 49.

<sup>64</sup> *Ibid* at para 257 [emphasis added].

<sup>65</sup> *Supra* note 12 at 210.

<sup>66</sup> *Ibid*.



as discussed in the last chapter, a result is that Eurocentric biases and assumptions again get pushed to the background, unacknowledged and unquestioned. This is produced, in this context, through how “the idea of testing already implies some particular system which has as its foundation a set of presuppositions and propositions which cannot themselves be tested or doubted.”<sup>67</sup> The *Van der Peet* test then, is again analogous to the nineteenth century positivists who inverted the flux and uncertainty of reality into an internally consistent and supposedly comprehensive legal framework through a series of ordering mechanisms which “assumed a transcendental quality that seemed beyond history and inquiry.”<sup>68</sup> With the transcendence of the Court’s categorical thought, as we have seen throughout Part I of this thesis, the test for Aboriginal rights also determines “what will count as evidence for arguments and verification”<sup>69</sup>: “The correct characterization of the appellant’s claim is of importance because whether or not the evidence supports the appellant’s claim will depend, in significant part, on what, exactly, that evidence is being called to support.”<sup>70</sup>

This aspect of the test is reflected in the evidentiary and other so-called “problems” (such as determining integrality) the Court is faced with. Thus, the Court says, for example, that the rules of evidence must be flexibly adapted “to the challenge of doing justice in aboriginal claims.”<sup>71</sup> Yet this “flexible adaptation” is only superficial, highlighting the belief in the objectivity of the Court and its rules as the Court has suggested that “three simple ideas” underlie “the diverse rules on the admissibility of evidence”:

First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable;

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<sup>67</sup> Stanley J Tambiah, *Magic, science, religion, and the scope of rationality* (Cambridge: Cambridge University Press, 1990) at 64.

<sup>68</sup> Anghie, *supra* note 36 at 20.

<sup>69</sup> Tambiah, *supra* note 67 at 64.

<sup>70</sup> *Van der Peet*, *supra* note 1 at para 51.

<sup>71</sup> *Mitchell*, *supra* note 39 at para 30.

unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.<sup>72</sup>

In other words, while the rules of evidence may be modified, the Court still preserves its position in the power asymmetry:

In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.<sup>73</sup>

McLachlin C.J. goes on to suggest that Aboriginal oral histories can potentially meet the test of usefulness if they “offer evidence of ancestral practices and their significance that would not otherwise be available.”<sup>74</sup> Yet as mentioned above, if the written record is entirely post-contact—something that even the Court has acknowledged<sup>75</sup>—are not Aboriginal oral histories the *only* evidence of “ancestral practices and their significance”?

This approach by the Court also reflects Neil Vallance’s point that they treat Aboriginal culture as a *fact* that results in Aboriginal culture as something that must be proven.<sup>76</sup> It is based on this treatment of culture as fact that Vallance suggests why the Court has never defined “culture” although it has defined a number of other ambiguous concepts such as “freedom of religion.”<sup>77</sup> This sets off Aboriginal rights claims: “My survey found no cases, outside the area of Aboriginal rights, in which claimants were required to prove anything about their culture as a

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid* at para 31.

<sup>74</sup> *Ibid* at para 32.

<sup>75</sup> See e.g. *Lax Kw’alaams Indian Band v Canada (AG)*, [2008] 3 CNLR 158 at para 20: “By definition, no historical documents exist prior to European contact with the oral culture of aboriginal societies.”

<sup>76</sup> “The Misuse of ‘Culture’ by the Supreme Court of Canada” in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 97 at 109.

<sup>77</sup> *Ibid.*

prerequisite for entitlement to rights.”<sup>78</sup> Therefore, Aboriginal rights have a more onerous burden in comparison to claimants to other rights.<sup>79</sup>

The perpetuation of the colonial power asymmetry is also manifested in how the Court treat Aboriginal cultures and practices as questions of fact instead of Aboriginal law and perspectives even though the Court has asserted that Aboriginal rights are intimately connected to the pre-contact situation.<sup>80</sup> As a result, the Aboriginal perspective is subjugated to judicial fact-finding and thrusts judges into the role of arbiters of authenticity.<sup>81</sup> Aboriginal right rulings become a process of discovery through a “retrospective social attribution” in the legal arena similar to the “discovery” of Indigenous peoples and lands during European expansion that was produced via Eurocentric tunnel history.<sup>82</sup>

“Tunnel history” is how political geographer J.M. Blaut refers to the Eurocentric way of thinking about world history and world geography.<sup>83</sup> Originally, up until World War II, tunnel history involved the belief that “history” was confined to the spatial boundaries of continental Europe: “History is a matter of looking back or down in this European tunnel of time and trying to decide what happened where, when, and why. ‘Why’ of course calls for connections among historical events, but only among the events that lie in the European tunnel. Outside its walls everything seems to be rockbound, timeless, changeless tradition.”<sup>84</sup> In this tunnel history, then, we see the work of the two Great Divides where human history rises up from the trajectory of

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<sup>78</sup> *Ibid* at 110.

<sup>79</sup> *Ibid*.

<sup>80</sup> Henderson, *supra* note 12 at 193.

<sup>81</sup> The Okanagan Nation Alliance and Shuswap Nation Tribal Council made this argument with regards to the integrality test in their intervener factum for *Sappier*, *supra* note 29 (Factum of the Okanagan Nation Alliance & Shuswap Nation Tribal Council at para 34).

<sup>82</sup> See e.g. David Turnbull, *Masons, Tricksters and Cartographers: Comparative Studies in the Sociology of Scientific and Indigenous Knowledge* (London: Routledge, 2000) at 144.

<sup>83</sup> *The Colonizer’s Model of the World: Geographical Diffusion and Eurocentric History* (New York & London: The Guilford Press, 1993) at 5 [Blaut, *Colonizer’s Model*].

<sup>84</sup> *Ibid*.

human evolution. Nature is static and fixed, as in the Laws of Nature, and human history becomes the increasing realization of “Culture” (rationality) and change for those living in “traditional cultures” must then originate from outside that timeless entity.<sup>85</sup>

After World War II, tunnel history was modified according to Blaut into a more subtle form but the core assumptions remained unquestioned.<sup>86</sup> So while supposedly stripped of the racism and colonial prejudices, as well as acknowledging that counter-diffusion occurred from “non-Europe” to Europe, the “somewhat new form” of tunnel history “actually, in most cases, simply [juxtaposed] negative (often prejudiced) statements about non-European history with positive statements about European history.”<sup>87</sup> For example, Blaut argues, “Most European historians still maintain that most of the really crucial historical events, those that ‘changed history,’ happened in Europe, or happened because of some causal impetus from Europe.”<sup>88</sup> I will return to this in the next chapter, but this tunnel history is illustrated by the Court’s pre-contact focus, which is a negative reflection of the belief in the positive statement about the arrival of a single European in Aboriginal peoples’ territories.

This reliance on Eurocentric tunnel history in the judicial process of imagining pre-contact practices, customs and traditions (“culture”) is reflective of what the philosopher of science David Turnbull has argued in terms of the belief that Columbus “discovered” America as not being a straightforward factual issue: “It depends on who makes the claim and what sort of evidence they provide to whom in what circumstances—in other words ‘discovery’ is a retrospective social attribution.”<sup>89</sup> For this attribution of “discovery” to be persuasive, someone

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<sup>85</sup> Mark Ebert, *To A Different Canoe: A Study of Cultural Pragmatics and Continuity* (PhD Thesis, University of Aberdeen, 2006) at 12-19 [unpublished] [Ebert, *Different Canoe*].

<sup>86</sup> Blaut, *Colonizer’s Model*, *supra* note 83 at 5-6, *Eight Eurocentric Historians* (New York & London: The Guilford Press, 2000) at 8 [Blaut, *Eurocentric Historians*].

<sup>87</sup> *Ibid.*

<sup>88</sup> *Colonizer’s Model*, *supra* note 83 at 7.

<sup>89</sup> *Supra* note 82 at 144.

had to return to Europe with evidence—particularly “in the form of documents and maps which would allow the information to be recorded and integrated with previous knowledge,”<sup>90</sup> resulting in the incorporation of these new lands and peoples into the narrative of Eurocentric tunnel history. Moreover, the idea of “discovery” “rests on the assumption of a world of facts waiting to be found, collected and classified, a world in which the neutral observer is not implicated.”<sup>91</sup> This parallels the “authenticating” process of the Court in Aboriginal rights rulings, where they too make a “retrospective social attribution” by “discovering,” in the legal arena, pre-contact Aboriginal peoples and cultures. In both then, we find the logic of inversion, where people’s lives, during the course of their involvement in and with the world, are removed, again leaving the world as a homogenous, empty substrate.<sup>92</sup>

An instance of the conceit and biases of both Eurocentric tunnel history and categorical thought comes from when early Europeans arrived on coastal British Columbia—an event seen as most significant in the analysis of practices, customs and traditions by the Court<sup>93</sup>—the Europeans mistook evidence of indigenous cultivation as just being part of the “natural” landscape because the style of cultivation lacked the “rectilinear plantings divided by picket fences, or monocultures of familiar plants.”<sup>94</sup> Recalling the role of agriculture in evolutionary

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<sup>90</sup> *Ibid.* See too Paul Carter, *The Road to Botany Bay: An Exploration of Landscape and History* (Chicago: University of Chicago Press, 1987) at 26-27, regarding the similar argument with regards to James Cook.

<sup>91</sup> *Ibid.* at 25.

<sup>92</sup> See e.g. Ingold, “Art of Translation”, *supra* note 24 at 226.

<sup>93</sup> Granted, if we use what the Court held in *R v Gladstone* ([1996] 2 SCR 723 at para 53 [*Gladstone*]), “contact” and European influence—therefore the cut off point for Aboriginal rights—occurred almost *two hundred years before* the first recorded direct contact between Europeans and the Aboriginal peoples of coastal British Columbia! See to in *Van der Peet*: “It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America.” *Supra* note 1 at para 61 [underlining in original].

<sup>94</sup> Douglas Deur & Nancy J Turner, “Introduction: Reconstructing Indigenous Resource Management, Reconstructing the History of an Idea” in Douglas Deur & Nancy J Turner, eds, *Keeping it Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Vancouver: UBC Press, 2005) 3 at 22. Though in *Tsilhqot’in Nation v British Columbia*, Justice Vickers does acknowledge that prior to contact the Tsilhqot’in did have cultivated fields, but they “were not cultivated in the manner expected by European settlers”; instead they were “cultivated” from the Tsilhqot’in perspective. [2008] 1 CNLR 112 at para 959. Ironically, there was one plant the

schemes, this supposed “lack” was then used as part of the colonial justification for dispossessing Aboriginal peoples of their land.<sup>95</sup> In other words, in contrast to more recent ethnographic and archaeological evidence,<sup>96</sup> European explorers failed to recognize plant cultivation because it was not *cognizable* to their own categories, presumptions and biases. This parallels the Court’s approach to the characterization and testing of Aboriginal rights claims, where the Court searches for what the claimant’s pre-contact ancestors were like through the importation of Eurocentric categories and taxonomies. Moreover, if there are significant errors or distortions like this in the written record, does this not bring that record further into question? And should this also not be a warning sign for the Court that the cognizable approach is riddled with problems? Thus, while the “discovery” approach of both early explorers and the contemporary Court towards the ancestors of Aboriginal rights claimants, then, supposedly does so through a “lateral” process of translation, what is actually involved is a “vertical” process of inversion.<sup>97</sup>

By atomizing “culture” into objectified practices, customs and traditions the Court’s approach to Aboriginal rights, then, divorces actions and activities from their performative Aboriginal contexts in the world, reconstituting them on a metaphysical, abstract plane of “culture” that a supposedly neutral observer can scrutinize for “facts.”<sup>98</sup> By dislodging actions and activities from their performative contexts also divorces them from their meaning. The original, “Aboriginal” meaning, though evaporates, and in its place “meaning” is restored through an assessment of integrity or centrality that, in turn, becomes a quality of the

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Europeans did recognize as cultivated at the time of first contact—tobacco—this was because, Douglas Deur and Nancy Turner suggest, the explorers were already familiar with this plant *that was introduced to Europe from the Americas*. *Supra* at 16.

<sup>95</sup> *Ibid* at 4.

<sup>96</sup> See e.g. *ibid* at 20-21.

<sup>97</sup> See e.g. Ingold, “Art of Translation”, *supra* note 24 at 218.

<sup>98</sup> See e.g. Vallance, *supra* note 76 at 109; Barsh & Henderson, *supra* note 49 at 1000.

objectified practice, custom or tradition through a retrospective social attribution. This Eurocentric process of inversion removes the acknowledgement of the agency that is part and parcel of life for Aboriginal peoples and their perspectives, as it is only the Court, through determining for the Aboriginal communities what is “integral” to their ancestors’ culture (thereby authenticating it), that holds the ability to restore (and protect) an essentialized vision of their culture and its intrinsic attributes or essences (objectified practices, customs and traditions).<sup>99</sup> The judicial process in determining the distinctiveness and integrality of objectified practices, customs and traditions has then become a contemporary post-contact ethnographic process. The ethnographies produced through this process, though, are not descriptive like their anthropological predecessors, but are definitive as to what “truly” (and authentically) made the culture of pre-contact ancestors “what it was.” Again, the logic of inversion and atomism combine to disempower Aboriginal communities, peoples and their perspectives.

Moreover, the restoration of meaning qua integrality by the Court highlights that “facts” have no meaning in isolation. It is only when a frame is imposed that the recognition of facticity and the attribution of meaning is possible.<sup>100</sup> In other words, although Lamer C.J. acknowledged that the exchange of fish occurred in pre-contact Stó:lō society, the “facts” that pre-contact Stó:lō were at a “band level of social organization,” appeared to have no regularized trade<sup>101</sup> or a market, and supposedly no methods to preserve fish created a “web of facticity” that led Lamer to conclude that such an exchange “was not a central, significant or defining feature of Sto:lo society,” and, as a result, did not qualify for protection.<sup>102</sup> Thus, although food and other fish

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<sup>99</sup> This, then, may lead to Indigenous peoples around the world to “discover” such objectified practices, customs and traditions: “The power and legitimacy of political rights that are embedded in ‘traditions’ in our Western society, is evidently one of the main forces behind indigenous peoples striving to invent or recreate fixed ‘traditions’.” Bjørn Bjerkli, “Land Use, Traditionalism and Rights” (1996) 13 *Acta Borealia* 3 at 11-12.

<sup>100</sup> Gaye Tuchman, *Making News: A Study in the Construction of Reality* (New York: The Free Press, 1978) at 88.

<sup>101</sup> Even if, as pointed out in chapter 2, Lamer may have made a mistake in this context.

<sup>102</sup> *Van der Peet*, *supra* note 1 at paras 90-91. Regarding the idea of “web of facticity” see Tuchman, *supra* note 100.

products were, and continue to be, an important aspect of the potlatch complex,<sup>103</sup> the “fact” (meaning) of this exchange is a product of framing it within a series of other “facts” “that, when taken together, presents themselves as both individually and collectively self-validating.”<sup>104</sup>

Far from being the product of some sort of supposedly objective act of “discovery,” then, “facts” are produced within and by a particular social and cultural context/frame.<sup>105</sup> The frame in Aboriginal rights cases is provided by the Court’s circular and self-reinforcing categorical thought. Thus, by using Eurocentric categories that have been naturalized like, as discussed in chapter 2, “band” and “commercial” as part of the fact finding process, determining Aboriginal rights becomes a search for the traits associated with each category. Because pre-contact Stó:lō society/culture was found by the trial judge to have been at a band level of social organization, which Lamer C.J. accepted, a web of facticity was created by the Court in which “band” means no specialization of labour, which, in turn, is then “suggestive ... that the exchange of fish was not a central part of Sto:lo culture.”<sup>106</sup> Yet similar to what I discussed in chapter 2 regarding “exceptional” hunter-gatherers, Lamer’s equation of specialization of labour in the exploitation of fisheries with how central the exchange of fish was assumes that the level of social organization correlates with the level of technological development thereby reproducing nineteenth century unilineal evolutionary arguments.<sup>107</sup> Pre-contact fishing technologies on the Northwest Coast, in contrast to the association of “simple” social organization with “simple” technologies, were so similar to the technologies brought to the region by Europeans that “the

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<sup>103</sup> See e.g. Mark Ebert, “Feasting Judicial Convergence: Reconciling Legal Perspectives through the Potlatch Complex” (2013) 18 Appeal 21 at 28.

<sup>104</sup> Tuchman, *supra* note 100 at 86.

<sup>105</sup> See e.g. Henderson, *supra* note 12 at 193; Lawrence Rosen, *Law as Culture: An Invitation* (Princeton NJ: Princeton University Press, 2006) at 8, 11; Bruno Latour, *We Have Never Been Modern* (Cambridge, MA: Harvard University Press, 1993) at 18.

<sup>106</sup> *Van der Peet*, *supra* note 1 at para 90.

<sup>107</sup> See e.g. Ingold, *Perception*, *supra* note 17 at 312-13; Rapport & Overing, *supra* note 27 at 379.



same English names have come to be used for both.”<sup>108</sup> Moreover, a government fisheries report suggested that the “traditional equipment” of Aboriginal fishers still “compares favourably” with the “technical and economic efficiency” of the “modern industrial fishery.”<sup>109</sup> If the Stó:lō, then, were in fact a “band” society with the “simple” technologies and social organizations implied by that category, what does that mean then for Europeans and the significance of their arrival? Moreover, it is interesting that in the concurrent judgements in *Gladstone* and *R. v. N.T.C. Smokehouse*<sup>110</sup> the criteria used was volume and intensity of exchange—not level of social organization.

That hierarchical categories of social organization continue to be used, but, as discussed in chapter 2, are a product of Eurocentric theorizing (and of questionable applicability to at least coastal British Columbia), highlights the Eurocentric, technocratic bias of the Court. The whole discussion of band versus tribal societies was introduced through expert witness testimony, illustrating the role of non-Aboriginal experts in producing this web of facticity: “legal ‘facts’ [are] more believable if they are backed by science or expert testimony.”<sup>111</sup>

*Jack & Charlie v. The Queen*,<sup>112</sup> while pre-dating s. 35, provides another illustration of categorical thought and the production of a web of facticity (as well as the implications of atomism). Briefly, the case involved two Coast Salish men who were charged with hunting deer out of season. The appellants argued that they killed the deer for use in a religious ceremony (a “burning”) for the deceased that involved the burning of raw deer meat.<sup>113</sup> At all levels of the Court, the original convictions were upheld because they felt, similar to Justice Bastarache in

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<sup>108</sup> Daniel L Boxberger, *To Fish In Common: The Ethnohistory of Lummi Indian Salmon Fishing* (Seattle: University of Washington Press, 2000) at 37.

<sup>109</sup> Peter H Pearse, *Turning the Tide: A New Policy for Canada’s Pacific Fisheries*, The Commission on Pacific Fisheries Policy Final Report (Vancouver: Minister of Supply and Services, Canada, 1982) at 174.

<sup>110</sup> [1996] 2 SCR 672.

<sup>111</sup> Rosen, *supra* note 105 at 180.

<sup>112</sup> [1985] 2 SCR 332 [*Jack & Charlie*].

<sup>113</sup> *Ibid* at 334-35.

*Sappier* regarding sustenance and the means of sustenance,<sup>114</sup> that there was no connection between the hunting of deer in preparation for the ceremony and the actual ceremony: at the Supreme Court of Canada (SCC), for example, Justice Beetz agreed with the Crown's likening of the distinction between killing and burning the deer with the purchase and administering of sacramental wine as part of a communion ceremony.<sup>115</sup> Following the Court's (and the Crown's) reasoning, since a priest breaks the law if they stole wine from a liquor store after it was closed, so too was hunting out of season.<sup>116</sup>

John Borrows criticized the ruling for failing to take into account the Aboriginal perspective, which he argues led the Court to accept an inappropriate analogy that “does not recognize the holistic practices of Salish legal tradition and thus fails to find a religious practice where one is present, at least from a Salish perspective.”<sup>117</sup> Yet the distinction held by the Court between hunting and religion is a product of the dual existence of the animal plus human person, where hunting is considered to be a “practical–technical interaction with environmental resources,” while ritual and ceremony are part of a “mytho–religious or cosmological construction of the environment.”<sup>118</sup> In other words, the Court holds steadfast to its categorical thought in which hunting is part of our engagement in/with the world of nature, while “religion” is part of the world of culture—irrespective of the Aboriginal perspective<sup>119</sup>—and it converts the “simple fact” of prior occupation into a property of “culture.”

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<sup>114</sup> *Supra* note 29 at para 37.

<sup>115</sup> *Jack & Charlie*, *supra* note 112 at 345; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 252.

<sup>116</sup> *Jack & Charlie*, *supra* note 112 at 345-46. Though this analogy seems to imply that *all* hunting of deer was illegal, and not the season. For is not the crime in the priest's case that they stole wine—regardless of whether or not the store was open or closed?

<sup>117</sup> Borrows, *supra* note 115 at 252.

<sup>118</sup> Ingold, *Perception*, *supra* note 17 at 56.

<sup>119</sup> Moreover, I have argued that the appellation of “religion” to Aboriginal cultures or practices is a distortion (and that even the idea of “religion” was introduced by Europeans). Ebert, *Different Canoe*, *supra* note 85 at 21-23, 106-

In this then, we can see the influence of the Eurocentric separation of nature and culture, and it is this distinction, produced by the Great Divides, that neutralizes the Aboriginal perspective. In chapter 2 I discussed how the first Great Divide separates humans from non-humans through the ascendancy of rationality in Eurocentric thought and how this resulted in the Eurocentric belief that science produces an objective account of nature. Rationality is then believed to allow the individual to “step outside” the world to view it as it “really is.” The second Great Divide, in turn, allows those “more endowed” with rationality to likewise “step outside” the “shackles” of culture and tradition that imprison “Them.”<sup>120</sup> It is only by stepping outside (or, more appropriately, above) that allows one to study “other cultures,” or “world views,” as discrete objects of contemplation.<sup>121</sup> “Culture” becomes like a perspective painting “in which a scene is depicted from a point of view which itself is given independently of that of the spectator who contemplates the finished work.”<sup>122</sup> In other words, the compounding of the two Great Divides produces a double disengagement necessary for an “objective” view—a view from “nowhere”—of the world and its inhabitants, which thereby allows their “discovery” and classification.

This enumeration of human/cultural differences, as with animal species in the “natural” world, is only possible through this removing of oneself above and beyond the world so that—“being simultaneously everywhere and nowhere”—the world as a whole can be viewed.<sup>123</sup> This dovetails with my discussion of meaning and integrality, as the objectification of the world requires being able to view it free from human meaning,<sup>124</sup> and any form or meaning individuals

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07. For a general discussion of how “religion” is understood in Canadian constitution law see Benjamin L Berger, “Law’s Religion: Rendering Culture” (2007) 45 Osgoode Hall LJ 277.

<sup>120</sup> Ingold, *Perception*, *supra* note 17 at 15.

<sup>121</sup> Ingold, “Art of Translation”, *supra* note 24 at 223.

<sup>122</sup> Ingold, *Perception*, *supra* note 17 at 15.

<sup>123</sup> *Ibid* at 217.

<sup>124</sup> Gordon, *supra* note 23 at 33-34.

claim to find in their own lives and experience must be conceived as being laid over the “real” reality produced through rationality.<sup>125</sup> Again, as discussed in chapter 2, “Westerners” (“Us”) are not one culture among many, we are, in a sense, “animal plus plus”: “we” understand, or have access to, nature or reality as it “really is” and not as a culturally constructed, subjective representation of it.<sup>126</sup> Thus, the Eurocentric conception of nature is not “cultural constructed,” it is instead naturalized as a real, objective (“really real”) reality.<sup>127</sup>

The resulting academic division of labour this epistemology produces<sup>128</sup> highlights how the two Great Divides manifest in legal settings. For example in *Delgamuukw v. B.C.*, Chief Justice McEachern questioned the plaintiffs’ expert witness anthropologist Richard Daly’s testimony because he felt Daly was “more an advocate than a witness” due to Daly’s use of the standard anthropological research technique of participant observation and his adherence to the American Anthropological Association’s Statement of Ethics.<sup>129</sup> McEachern contrasted the anthropologists with the implied objectivity of the historians: “Generally speaking, I accept just about everything [the historians] put before me because they were largely collectors of archival, historical documents. In most cases they provided much useful information with minimal editorial comment. Their marvellous collections largely spoke for themselves.”<sup>130</sup> McEachern is

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<sup>125</sup> Ingold, “Art of Translation”, *supra* note 24 at 224.

<sup>126</sup> See e.g. Latour, *supra* note 105 at 97.

<sup>127</sup> Ingold, *Perception*, *supra* note 17 at 41. Similarly, Antony Anghie suggests that the positivists’ equating of Europe with sovereignty not only excluded non-Europeans “from the realm of sovereignty,” but naturalized European culture and society (*supra* note 36 at 68) through the Eurocentric belief in their own superiority over others based on their supposed inherent uniqueness. Blaut, *Eurocentric Historians*, *supra* note 86.

<sup>128</sup> See text accompanying note 40 in chapter 2.

<sup>129</sup> [1991] 5 CNLR 1 at 41-42 (BCSC) [*Delgamuukw* (BCSC)]. See Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at xxiii-xxv and Richard Daly & Antonia Mills, “Ethics and Objectivity: AAA Principles of Responsibility Discredit Testimony” (1993) 34:8 Anthropology Newsletter 1 for a discussion of his, and another of expert witnesses for the plaintiffs, view of what happened.

<sup>130</sup> *Delgamuukw* (BCSC), *supra* note 129 at 41-42. Note the similarity between how McEachern characterizes the activities of the historians and the discussion of “discovery” in text accompanying note 91. In contrast to this portrayal of historians, McEachern characterized the anthropologists thusly: “Again, however, apart from urging almost total acceptance of all Gitksan and Wet’suwet’en cultural values, the anthropologists add little to the

not alone in rejecting anthropological evidence: as Brian Gover and Mary Locke Macaulay point out, noting McEachern's position in particular, that bias is often cited as why social scientific evidence is rejected.<sup>131</sup> Yet in his preface to Daly's *Our Box Was Full*, Peter Grant, the legal counsel who introduced Daly's evidence in *Delgamuukw*, points out a contradiction in the Court's position that highlights the dichotomization of objective and subjective and, as a result, of science and anthropology: "How absurd it would be to say that a medical doctor was biased due to her/his obligation under the Hippocratic Oath to safeguard her/his patient's well-being."<sup>132</sup> Similar to Aboriginal rights and "distance" from non-Aboriginal practices, customs and traditions discussed above, "objectivity" involves a distancing of observer from observed: "It is always unfortunate when experts become *too close* to their clients, especially during litigation."<sup>133</sup> Thus, because anthropologists, at least when working for Aboriginal litigants, work with actual people during the course of their lives, their objectivity is questioned, unlike those who work with the supposedly objective (and lifeless) written record—illustrating Lawrence Rosen's point above regarding the relationship between science, experts and legal facts.<sup>134</sup>

In a sense, what we have are movements similar to the Eurocentric conception of culture: anthropologists as bridging the "gap" between "Us" and "Them" by moving "closer" to

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important questions that must be decided in this case. This is because, as already mentioned, I am able to make the required important findings about the history of these people, sufficient for this case, without this evidence." *Delgamuukw* (BCSC), *supra* note 129 at 43. In this we can see how even when the Aboriginal perspective is filtered through Eurocentric anthropological expert witnesses it is still considered to "add little to the important questions." McEachern's rejection of the anthropologists' testimony was "hotly contested by the appellants in their written submissions" to the SCC and was noted, though only in passing, by Lamer CJ who deferred to McEachern's findings. *Delgamuukw* (SCC), *supra* note 16 at para 91.

<sup>131</sup> Brian J Gover & Mary Locke Macaulay, "'Snow Houses Leave No Ruins': Unique Evidence Issues in Aboriginal and Treaty Rights Cases" (1996) 60 Sask L Rev 47 at 81-82.

<sup>132</sup> Peter Grant, "Foreword" in Daly, *supra* note 129, xvii at xix.

<sup>133</sup> *Delgamuukw* (BCSC), *supra* note 129 at 43 [emphasis added].

<sup>134</sup> See text accompanying note 111. For a further discussion of subjectivity, objectivity, and oral versus written accounts in the contexts of McEachern's ruling in *Delgamuukw* see Julie Cruikshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. B.C.*" (1992) 95 BC Studies 25.

Aboriginal peoples. Because Aboriginal peoples, or their cultures at least, are not essentialized as “scientists,” anthropologists who fail to adopt the practices and categorical thought of “objective” science are believed to be subjective advocates and are open to charges of having “gone Native”:

I did not subscribe to the obscurantist legal fiction that I was working as a transcendent subject who observes the phenomenal world from a non-phenomenal Platonic realm of forms ... However, it ... left my work open to racist charges from the defendants’ counsel [in the *Delgamuukw* proceedings], who insisted that I had ‘gone Native’ simply because I practised a standard anthropological approach to data collection – namely, participant observation.<sup>135</sup>

The Court, on the other hand/direction, inverts, or distills, “subjective” experience and life into a lifeless objective world of “facts.”<sup>136</sup>

Again we see “culture” as a distorting lens, and the judicial search for “facts” then involves the removing the subjectivity of the Aboriginal perspective that warps perception of the “really real,” intrinsic nature of the object etc.<sup>137</sup> And because the Court subscribes to the ideal of objectivity, it becomes self-reinforcing as it results in a lack of reflexive examination of their ideals/beliefs, due to the association of objectivity with the “really real.”<sup>138</sup> In this turn results in only new information that is consistent with those beliefs, or can be construed as such, is accepted while inconsistent information is rejected:<sup>139</sup>

The Medeck or supernatural portion of these adaawk is a matter of belief, or faith, rather than rational inference. That portion of the adaawk is not necessary for the purposes for which the adaawk is tendered in evidence. Assuming these adaawk describe a landslide, I believe it could be reasonable to regard them as confirmatory of other evidence of aboriginal presence in the area at that time.<sup>140</sup>

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<sup>135</sup> Daly, *supra* note 129 at xxiii.

<sup>136</sup> Regardless of how one feels about how “objective” the Court/judges actually are, objectivity, and particularly the objectivity of the natural sciences, is the ideal.

<sup>137</sup> See e.g. Gordon, *supra* note 23 at 25.

<sup>138</sup> Adam Benforado & Jon Hanson, “Naïve Cynicism: Maintaining False Perceptions in Policy Debates” (2008) 57 Emory LJ 499 at 518.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Delgamuukw* (BCSC), *supra* note 129 at 57.

The opposition between belief and rationality asserted in this passage is founded on the same Eurocentric assumptions as subjectivity–objectivity. Again, rationality is associated with reality “as it really is,” while belief refers to some aspect of “their” world that does not exist in “ours” and so is taken to not be part of empirical reality.<sup>141</sup> Thus, beliefs (or the “supernatural”) are not “facts,”<sup>142</sup> but are “cultural” and subjective, and, because they are not founded on science, “belief” implies falsehood or “mistaken understandings” of empirical reality.<sup>143</sup>

Yet if “facts” are determined through a “transcendent objectivity,” is it at all possible, given the opposition of subjectivity and objectivity in Eurocentric thought, to have an objective fact finding of the subjective?<sup>144</sup> This query is hinted at by Justice McLachlin in her dissent in *Van der Peet*:

To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.<sup>145</sup>

As we can see, though, McLachlin is still working within the subjective–objective opposition thereby maintaining the underlying assumptions of the Court. This highlights the paradoxical nature of the Court’s approach: as I have been attempting to show, the Court treats “facts” as if they are real through unacknowledged and unquestioned that presumes they are external to and distinct from the observer.<sup>146</sup> These assumptions are then used to interpret evidence.<sup>147</sup> Again the

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<sup>141</sup> Byron J Good, *Medicine, rationality, and experience: an anthropological perspective* (Cambridge: Cambridge University Press, 1994) at 15.

<sup>142</sup> See e.g. *Delgamuukw* (BCSC), *supra* note 129 at 41.

<sup>143</sup> Good, *supra* note 141 at 20.

<sup>144</sup> Richard A Shweder, “Divergent Rationalities” in Donald W Fiske & Richard A Shweder, eds, *Metatheory in Social Science: Pluralisms and Subjectivities* (Chicago: University of Chicago Press, 1986) 163 at 176.

<sup>145</sup> *Van der Peet*, *supra* note 1 at para 257.

<sup>146</sup> See e.g. Shweder, *supra* note 144 at 172.

<sup>147</sup> See text accompanying notes 67-69.

decision-maker is made invisible—for supposedly “they” (as subjective beings) do not participate in the “objective” fact finding process—and it is in this way that it is at all possible to have an objective fact finding of the subjective: through the (fallacious) denial of the life of the judge and their existence in the world.<sup>148</sup> “Facts” then represent a final stage of the inversion of culture, as “facts” are those objectified practices, customs and traditions that the Court has authenticated as making a “culture” “what it was.”

It is this belief in “facts” and objectified practices, customs and traditions as existing “out there” and accessible only to objective Eurocentric observers that neutralizes the Aboriginal perspective. Because those living *in* culture can only construct the world through their received cultural heritage<sup>149</sup> that is more “really” known to Eurocentric scientists and, for our concerns, judges, the challenge those alternative views may pose to the hegemony of Eurocentric thought is neutralized.<sup>150</sup> Not only does this dismiss the Aboriginal perspective from the Court’s fact finding process due to its supposed bias (qua subjectivity), it also justifies their “cognizable” approach to the Aboriginal perspective as it is only through the “vertical” process of inversion removing practices, customs and traditions from the lives of Aboriginal claimants and their

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<sup>148</sup> While this assertion may resonate with the Legal Realist and Critical Legal (CLS) approaches in jurisprudence, there are significant differences between my underlying reasoning and concerns, as may be apparent, and those of realist and critical legal scholars. While a full discussion of these differences are beyond the scope of this thesis, given that Mark Tushnet has suggested that “CLS is ... the form that modernism takes in legal thought” (“Critical Legal Studies: An Introduction to its Origins and Underpinnings” (1986) 36 J Legal Educ 505 at 517), Latour’s discussion of the “modern critique” is pertinent (*supra* note 105 at 35-37), as well as, more generally, Gordon Christie’s critical analysis of CLS in the contexts of Aboriginal peoples in Canada (“Law, Theory and Aboriginal Peoples” (2003) 2 Indigenous LJ 67). For a general overview of legal realism see e.g. Brian Leiter, “American Legal Realism” in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory*, 2d ed (Chichester, UK: Wiley-Blackwell, 2010) 249. In addition to Tushnet’s article above, see e.g. Mark Tushnet, “Survey Article: Critical Legal Theory (without Modifiers) in the United States” (2005) 13 Journal of Political Philosophy 99 and Guyora Binder, “Critical Legal Studies” in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory*, 2d ed (Chichester, UK: Wiley-Blackwell, 2010) 267 for overviews of CLS.

<sup>149</sup> And because each construction of the world is culturally particular, this then explains, from the Eurocentric perspective, cultural diversity. Again, as discussed above, we see yet again difference rendered as diversity. See text accompanying notes 24-26.

<sup>150</sup> Ingold, “Art of Translation”, *supra* note 24 at 230, “The Man”, *supra* note 25 at 361.



ancestors, that the “Other” can be brought as close as possible (“cognizable”) to Eurocentric categories and taxonomies.<sup>151</sup>

Yet this approach creates a paradox: if a distinction is maintained between the subjective Aboriginal perspectives and legal systems and the objective common law, the idea that the former can be “translated” into the latter implies that those subjective perspectives and legal systems actually have an objective existence in empirical reality that the Court can “discover.” Objective reality, though, recedes ever further into the background as the subjective–objective distinction means that the “Aboriginal perspective” is actually the “Aboriginal perspective of the ‘Aboriginal perspective’”—further neutralizing it in the process as the perspectives of actual Aboriginal peoples distorts what the “Aboriginal perspective” “truly” is! Again we are back to the view that all humans have the capacity to be “scientists” But to maintain the continuity of the first Great Divide, the Court must assume that Aboriginal peoples have the *capacity* to become common law jurists, and therefore their perspectives and legal systems are susceptible to being made “cognizable” to the common law. To adopt Bruno Latour’s statement from chapter 2: Give the Aboriginal peoples a gavel, and they will think exactly like common law jurists!

It is through the “cognizable” approach, then, that the Court again reinvents Canadian law as being integral to Aboriginal legal systems.<sup>152</sup> As without the neutralization of the Aboriginal perspective, the whole test for Aboriginal rights (as well as more fundamental issues like Crown sovereignty and the relationship between the state and Aboriginal peoples) is brought into question. So, while Justice L’Heureux-Dubé appears to call for more weight be given to the Aboriginal perspective in her *Van der Peet* dissent (and, in fact, alludes to the perspective more

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<sup>151</sup> See e.g. Ingold, “Art of Translation”, *supra* note 24; Latour, *supra* note 105 at 97.

<sup>152</sup> See text accompanying note 12. Henderson’s argument is about the reinvention of Canadian law as integral to Aboriginal law during the characterization phase, thus, according to my argument, it appears that at more than one point during the test for Aboriginal rights the naturalization of Eurocentric thought results in, for whatever reasons, the redefinition or distortion of Aboriginal legal systems through the lens of Canadian law.

often than Lamer C.J. does), she too misses what would perhaps be the most significant implication of the Aboriginal perspective: that Eurocentric atomism and the distinction of culture from nature are not cross-culturally valid/applicable. If the Aboriginal perspective was to be truly taken into account during the first two phases of the test for Aboriginal rights, it would speak to more than just significance or importance,<sup>153</sup> it would strike at the heart of the test itself. Therefore, if the Aboriginal perspective was truly taken into account in the characterization and integrality phase of the test—as Lamer C.J. even implies in *Van der Peet*<sup>154</sup>—the “legal personality” of the common law, for example, will have to be extended beyond the human species to incorporate or allow for what have been called in the ethnographic literature “other-than-human” persons.<sup>155</sup>

In a way, then, chapter 5 can be read as exploring further implications of more fully taking the Aboriginal perspective into account, as my proposed trans-systemic framework does not take the Eurocentric distinction of culture from nature and the attendant implications as a starting point. But because the Eurocentric assumptions and biases remain unacknowledged and unquestioned, the Court perpetuates the power asymmetry that began, unlike the Court’s “cut off” point for Aboriginal rights, not at the moment of first “contact” with a European, but rather when Euro-Canadian populations became relatively large enough to assert an assumed control over various territories and the lives of its myriad inhabitants.

And while the taxonomies and categories of Eurocentric thought are believed to give certainty to the Court’s deliberations,<sup>156</sup> the uncertainty of which categories a specific court will

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<sup>153</sup> See e.g. *Van der Peet*, *supra* note 1 at paras 166, 219.

<sup>154</sup> *Ibid* at paras 18-19.

<sup>155</sup> See e.g. Borrows, *supra* note 115 at 64, 242-46. For the “classic” discussion of other-than-human persons in anthropology see A Irving Hallowell, “Ojibwa Ontology, Behavior, and World View” in Stanley Diamond, ed, *Culture in History: Essays in Honor of Paul Radin* (New York: Columbia University Press, 1960) 19.

<sup>156</sup> See e.g. Anghie, *supra* note 36 at 20.

use and how they will be defined results in Aboriginal rights claims becoming a case-by-case lottery: as Vallance has argued, “it is difficult to ascertain with any certainty the requirements of the test, let alone how to satisfy them.”<sup>157</sup> This is ironic given that McEachern C.J. rejected the claims to jurisdiction and sovereignty over land because he characterized the laws Gitksan and Wet’suwet’en witnesses described as being “a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves,” and, as a result, “that they cannot be classified as laws.”<sup>158</sup> Again, then, we have another double standard. On the one hand, because the Court dispositionalizes and inverts Aboriginal culture, variation among the members of a particular “culture” brings that culture into question.<sup>159</sup> On the other hand, the denial of subjectivity in determining Aboriginal rights claims and the naturalization of the Court’s categorical thought results in a (wrongly) assumed consistency and coherence. If the standard to qualify as “law,” though, is adherence by *all* members of a group, does this not bring Canadian law into question? Moreover, given that “culture” is far from a settled concept, is it not then a poor foundation to build a consistent and coherent framework? All of this appears to suggest some arbitrariness to the test for Aboriginal rights, and, as a result, does it not run counter to the principles of fundamental justice then?

If an Aboriginal claimant is able to overcome all these biases and double standards, and the Court “authenticates” their ancestors’ pre-contact culture by finding an objectified practice, custom or tradition that fits with the Court’s characterization of the right and is integral to that distinctive culture, a right comes into existence and the Court returns from its journey to the past.

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<sup>157</sup> *Supra* note 76 at 109.

<sup>158</sup> *Delgamuukw* (BCSC), *supra* note 129 at 206. A further irony of McEachern’s assertion is that if a criterion to qualify as “law” is that they must frequently be adhered to, does this not bring in to question Canadian law?

<sup>159</sup> Again, this is because, as discussed in chapter 2 (in text accompanying notes 125-128), all difference is pushed to the boundaries between homogenized cultural “wholes.”

Unfortunately, though, their journey is not complete, and with that we move into the final chapter of Part I.

# 4

## The Evolution & Continuity of “Culture” & Aboriginal Rights

It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right.

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The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow, supra*, at p. 1093, that “the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time”. The concept of continuity is, in other words, the means by which a “frozen rights” approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

*per* Lamer C.J.<sup>1</sup>

We left off in the last chapter with the coming into existence of an Aboriginal right and with that the Court returns to the present for the final phase of their test. Thus, the test for Aboriginal rights begins in the present with an individual making a claim to a contemporary Aboriginal right which results in the Court journeying to the supposed pre-contact past to characterize the right through the isolation of an objectified practice, custom or tradition which is then “tested” for its integral contribution to the distinctiveness of the claimant’s ancestors’ “culture.” The Court then returns through time to the present, applying the *R. v. Sparrow*<sup>2</sup> test to determine whether the Aboriginal right has been extinguished, and, if not, has it been infringed and if that infringement

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<sup>1</sup> *R v Van der Peet*, [1996] 2 SCR 507 at paras 62, 64 [*Van der Peet* (SCC)].

<sup>2</sup> [1990] 1 SCR 1075 [*Sparrow*].

is justified. And while none of the *Sparrow* test appears to focus on Aboriginal peoples, an irony of this final phase of the test for Aboriginal rights generally is that only now is there anything approaching the taking into account of the Aboriginal perspective—even though, as discussed earlier, it is actually the only perspective that can provide insights into life prior to the arrival of Europeans. This again serves to further marginalize the Aboriginal perspective as now we are dealing in the present, producing the Court’s assertion that it “must be framed in terms cognizable to the Canadian legal and constitutional structure.”<sup>3</sup>

To link the past with the present the Court, as seen in the epigraph above, relies on the concept of continuity and the doctrine of discontinuous or logical evolution.<sup>4</sup> Yet in doing so, the Court’s deficient understanding of the concept of culture is revealed in how they treat cultural dynamics: as while the Court’s return from their journey into the pre-contact past is more of a leap, the Aboriginal right, if successfully demonstrated in the pre-contact, is partly dragged along behind them. And similar to the evolution of the right, the Court’s role as an arbiter of authenticity evolves along with it: in earlier phases of the test this role, as discussed in the last chapter, involved the Court deciding what made the claimant’s ancestors “distinctive,” and, therefore, a separate “culture” (“what it was”), in the final phase of the test this role evolves into the Court determining if the contemporary claimant remains, although in changed circumstances, “authentic enough” to be the contemporary heirs of the right. In part, this involves continuity by determining who the “proper right holders” are: “The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely.”<sup>5</sup> It

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<sup>3</sup> *Van der Peet* (SCC), *supra* note 1 at para 49.

<sup>4</sup> The doctrine of discontinuous evolution refers to Chief Justice Lamer’s conception of continuity quoted in the epigraph of this chapter, that does not involve an “unbroken chain” between the past and the present.

<sup>5</sup> *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 67 [*Marshall; Bernard*].

also involves another sense of continuity, alluded to in the epigraph, in which the Court determines what counts as an “authentic” adaptation to the changing contexts that accompanied the first sense of continuity.

Paralleling the rendering of difference in the language of diversity discussed in the last chapter, this duality in the concept of continuity belies the Eurocentric separation of nature from culture, as the “most basic sense” of continuity arises “by virtue of an individual’s ancestrally based membership in the present community,”<sup>6</sup> while the latter sense involves “continuity” in practices, customs and traditions. This duality is then analogous to the genealogical model in anthropology discussed in chapter 1, replicating the dual transmission of biological and cultural relatedness/connection.

Moreover, because Eurocentric thought holds nature as prior to culture,<sup>7</sup> this helps to explain not only Chief Justice Lamer’s paradoxical assertion regarding how the concept of continuity avoids a “frozen rights” approach to s. 35(1) of the *Constitution Act, 1982*,<sup>8</sup> while suggesting that it “does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact.”<sup>9</sup> It is through the Court’s power to determine Aboriginal rights then, that they are able to authenticate the evolution of the “culture” of a particular Aboriginal peoples. The ability to make such determinations are not only founded on the Eurocentric ideal of objectivity, but also through the naturalization of Eurocentric categorical thought and culture. And because Eurocentric thought, due to the second, external Great Divide, does not “culturally construct”

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<sup>6</sup> *R v Powley*, [2003] 2 SCR 207 at para 14 [*Powley*]. Not only does this passage from *Powley* ground this continuity in biological connection, note how it is membership in a community *not* to a culture or society.

<sup>7</sup> See e.g. Deborah Gordon, “Tenacious Assumptions in Western Medicine” in Margaret Lock & Deborah Gordon, eds, *Biomedicine Examined* (London: Kluwer Academic Publishers, 1988) 19 at 27.

<sup>8</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>9</sup> *Van der Peet* (SCC), *supra* note 1 at para 65.

reality but, rather, has direct access to “real” reality, the Court’s background assumptions and categories are taken as part of that “really real” reality and so they remain—in contrast to Aboriginal jurisprudences, evidence, and perspectives—unacknowledged and unquestioned. Thus, the Court fails to acknowledge (or realize) that pizza, the Aboriginal food fishery, commercial canning technologies etc. are all *post*-contact developments!

The focus of this chapter, then, continues with the themes identified so far in Part I. I begin by focusing on the problems and biases that the Court’s conception of culture creates in terms of how they treat cultural dynamics while determining whether claims to a contemporary Aboriginal right are successful or not. The Court’s approach to cultural dynamics, similar to the general Eurocentric approach, is particularly problematic through its framing with the opposition of tradition and modern.<sup>10</sup> Thus, I will first show how the concept of tradition, as we have seen, “shackles” Aboriginal peoples, their ancestors, and their claims due to the concept being framed in a language of transmission. By framing “tradition” as something that is transmitted contributes to the Gordian knot that is the vague issue of European influence. I then focus on the “arose solely” aspect of European influence discussed by Lamer C.J. in *R. v. Van der Peet*, and explore how it is particularly problematic and disempowering for Aboriginal peoples and their claims as it results in a calculative test for authenticity or assimilation. Yet as pointed out throughout this chapter, this authentication is a product of inversion and dispositionism that serves as yet another instance of the rendering of Aboriginal rights lifeless. Moreover, this process is based on Eurocentric tunnel history and so I discuss how this allows Euro-Canadians to adapt to Aboriginal peoples but not vice versa.

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<sup>10</sup> See Mark Ebert, *To A Different Canoe: A Study of Cultural Pragmatics and Continuity* (PhD Thesis, University of Aberdeen, 2006) [unpublished] [Ebert, *Different Canoe*].



I then turn to discussing how the Court approaches the evolution of practices, customs and traditions from the pre-contact to the contemporary, and how time and life are treated in these deliberations. This leads into a discussion of the Court's doctrines of discontinuous and logical evolution and how they are framed through the example of Aboriginal rights cases involving claims to commercial rights. As a result, given the Court's linking of European culture and the notion of commerce,<sup>11</sup> the issues of European influence and the Court's categorical thought loom large through their contemplation of whether a commercial claim has been successful. This discussion of the doctrines of evolution and claims to commercial rights comprises the bulk of this chapter—in fact it could be an entire thesis on its own—as I explore not only the problems the Supreme Court of Canada (SCC) has created and had, but also how it has been applied and interpreted in recent cases at lower levels of the Court. Given that this chapter involves whether there is a *contemporary* Aboriginal right and the time frame is from contact on, I show how the Court continually ignores the intersocietal “essence” of Aboriginal rights that Lamer C.J. identified in *Van der Peet*.<sup>12</sup> It is this “essence” that provides a space for the trans-systemic framework I outline in chapter 5.

### **I. The Court's “Tradition”**

The Court's approach to cultural dynamics, and, therefore, authenticity, is epitomized in Chief Justice Lamer's grounding of Aboriginal rights in “pre-existing” (pre-contact) Aboriginal cultures and/or societies via the word “tradition.” As discussed earlier, Lamer, using a dictionary, defines tradition as “that which is ‘handed down [from ancestors] to posterity’.”<sup>13</sup> Thus, “things” (objectified practices, customs, traditions—as well as laws) are “passed down” or transmitted

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<sup>11</sup> See e.g. *R v Gladstone*, [1996] 2 SCR 723 at para 28 [*Gladstone*].

<sup>12</sup> *Supra* note 1 at para 42.

<sup>13</sup> *Ibid* at para 40 [alteration in original].

from generation to generation up until the present.<sup>14</sup> These traditional “things,” then, not only remained anchored in the past, but are also grounded in an assumption of a stable and lasting state of affairs.<sup>15</sup>

Moreover, because the standard for Aboriginal rights is what the objectified practice, custom or tradition was just before the moment of contact with a European person, society, culture or sovereign,<sup>16</sup> Eurocentric tunnel history crystallizes the practice, custom or tradition at that point in time—and, in fact, John Borrows argues that the test developed in *Van der Peet* requires a static conception of “culture.”<sup>17</sup> Thus the Court reproduces the more general Eurocentric conception of cultural dynamics by relying on an inverted and static conception of culture. Determinations of change, evolution or continuity, then, are based on the comparison of the present with, in the contexts of Aboriginal rights, the moment just prior to the arrival of a European.<sup>18</sup> As a result, Aboriginal rights are based on an assumption of an imagined state of purity that is believed to have existed: “This test embodies inappropriate and unprovable assumptions about aboriginal culture and society. It forces the claimant to embark upon a search for a pristine aboriginal society and to prove the continuous existence of the activity for ‘time immemorial’ before the arrival of Europeans.”<sup>19</sup> “Purity” in this sense means untouched/-influenced by Europeans—again highlighting Eurocentric tunnel history. This is further illustrated in how the Court has accepted pre-contact exchange, and therefore interaction, among

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<sup>14</sup> *Ibid.*

<sup>15</sup> Ebert, *Different Canoe*, *supra* note 10 at 9.

<sup>16</sup> I will discuss this further in what follows, but the cut off point for Aboriginal rights and “tradition” is by no means settled. See e.g. *Van der Peet* (SCC), *supra* note 1 at paras 60 (contact with European society), 73 (contact with European culture), 89 (contact with European society and/or culture), 167. In a perhaps worrying trend, Justice Sattahoe in *Lax Kw’alaams Indian Band v Canada* (AG) ([2008] 3 CNLR 158 (BCSC) [*Lax Kw’alaams* (BCSC)]) may have pushed the boundary back even further by using “proto-contact.” When the case went to (and was affirmed by) the Court of Appeal ([2010] 1 CNLR 278 [*Lax Kw’alaams* (BCCA)]) and the Supreme Court ([2011] 4 CNLR 346 [*Lax Kw’alaams* (SCC)]), neither level questioned, or seemed to notice, this aspect of the ruling.

<sup>17</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 263 [Borrows, *Indigenous Constitution*].

<sup>18</sup> See e.g. Ebert, *Different Canoe*, *supra* note 10 at 4-5.

<sup>19</sup> *Van der Peet* (SCC), *supra* note 1 at para 168, *per* L’Heureux-Dubé J (dissenting).

Aboriginal peoples, but such “influence” is not considered to “change” either group.<sup>20</sup> Therefore the theory of “true” and/or “authentic” Aboriginal culture is that it is believed to have existed prior to contact, and since then has undergone degradation (relative to that “true” culture) and/or loss.<sup>21</sup>

This “culture loss,” though, is not only in the sense of losing parts of the “traditional” culture (from an internal perspective), but also in terms of contemporary authenticity (from an external perspective)—and, therefore, distinctiveness. Anthropologist Ronald Niezen has argued that the Court’s emphasis on distinctiveness in Aboriginal rights “can lead to an equally distorted preservationist impulse to control the pace of change, to ‘protect’ those original people living close to nature, to recognize distinct rights only to the extent that they are far removed from economic and political development.”<sup>22</sup> Accordingly, only those objectified practices, customs and traditions that the Court *decides*, in their role as arbiters of authenticity, are pre-contact and distinctive to making a culture “what it is” can garner legal recognition and protection,<sup>23</sup> thereby reducing continuity to that change–non-change dichotomy. Thus, the Court can determine that trade between Stó:lō and representatives of the Hudson’s Bay Company (HBC) was “qualitatively different” than pre-contact Stó:lō exchange, resulting in the rupturing of continuity through the inversion of life.<sup>24</sup> But what is the difference? For example, Lambert J.A. argued in his dissenting opinion in *R. v. Vanderpeet* that the arrival of the HBC “did not give rise to a new custom or practice. It represented only a response to a new circumstance in the carrying out of

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<sup>20</sup> See e.g. *ibid* at paras 88-89.

<sup>21</sup> Ebert, *Different Canoe*, *supra* note 10 at 11-12.

<sup>22</sup> Ronald Niezen, “Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada” (2003) 18:2 CJSLS 1 at 25.

<sup>23</sup> See e.g. Anthony Connolly, “Judicial Conceptions of Tradition in Canadian Aboriginal Rights Law” (2006) 7 The Asia Pacific Journal of Anthropology 27 at 31.

<sup>24</sup> *Van der Peet* (SCC), *supra* note 1 at para 89. This ignores the requirement that trade can continue and adapt to the arrival of Europeans and that discontinuity is only created when the existence of an Aboriginal practice, custom or tradition “arose solely” as a response to European arrival. *Ibid* at para 73.

the existing practice.”<sup>25</sup> By holding that there is no continuity between those two periods with regards to exchange, Lamer C.J. usurped Aboriginal agency and/or creativity that are part and parcel of being alive through the denial, on the one hand, of a dynamic pre-contact “history” and/or culture and, on the other, denying Aboriginal peoples a role in the “evolution” of their culture (and, as I will discuss below, of Euro-Canadian culture as well) since contact. This position by the Court, according to Sákéj Henderson, resonates with social Darwinist arguments: “The judicial presumption that Aboriginal cultures and freedoms are less dynamic or creative than other cultures, or that they must remain stuck in time in order to remain authentic and deserve to retain their rights, is cultural and sociological nonsense recalling the discredited social-Darwinist conception of ‘primitivity’.”<sup>26</sup>

Thus, the Court’s approach is again lifeless as this denial is founded on an atomization of life, fragmenting it into a series of discrete, essentialized “snapshots,” elevating some as significant while demoting others as incidental—much like their similarly lifeless conception of culture. The conceit of Eurocentric tunnel history is once more reinvented as integral to Aboriginal rights, as European contact is taken, regardless of the Aboriginal perspective,<sup>27</sup> as the most significant occurrence in the lives of the claimant’s ancestors, and Aboriginal rights (qua “authentic” practices, customs or traditions) become measured in their distance from those of Europeans. By rendering Aboriginal rights lifeless then, the Court is forced to view continuity

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<sup>25</sup> *R v Vanderpeet*, [1993] 5 WWR 459 at para 180 [*Vanderpeet* (BCCA)].

<sup>26</sup> James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006) at 209. An example of this usurpation is provided by the portrayal of the Mi’kmaq since contact by the Attorney General of Nova Scotia in their intervener factum in *R v Sappier; R v Gray* where they asserted that the Mi’kmaq “reeled before the unrelenting advance of western society,” and in how “s. 35(1) of the *Constitution Act* came to the aid of native peoples in their struggle for survival as distinctive peoples in the western, industrial ‘melting pot’ that had enveloped them.” *R v Sappier; R v Gray*, [2006] 2 SCR 686 (Factum of the AG of Nova Scotia at paras 62-63 [FoNS]). The invisible hand of colonialism and its policies is wiped away, serving to perpetuate it.

<sup>27</sup> “No matter how the deciding date [of British sovereignty] is agreed upon, it will not be consistent with the aboriginal view regarding the effect of the coming of Europeans.” *Van der Peet* (SCC), *supra* note 1 at para 167 [alteration added].

and change through the language of transmission and (faithful) replication—“that which is ‘handed down’”<sup>28</sup>—and not through ontogenetic adaptation during the course of people’s lives in the world.

## **II. The Paradox of European Influence in the Continuity Test**

The fact that Europeans in North America *engaged in the same* practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community’s culture *prior to contact* with Europeans, the fact that that practice, custom or tradition *continued* after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; *European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right*. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.<sup>29</sup>

The language of transmission creates further problems and contradictions in the Court’s approach to the issue of European influence that partly belies dispositionism. We can see in the above passage from *Van der Peet* that, on the one hand, Lamer C.J. asserts that an Aboriginal claim that appears similar to European culture remains valid even if an integral, objectified pre-contact practice, custom or tradition continued while adapting in response to European contact.<sup>30</sup> This assertion is consistent with Lamer’s earlier conception of the “essence” of Aboriginal rights as the “bridging of aboriginal and non-aboriginal cultures,” which is neither English nor Aboriginal in origins—but is “intersocietal.”<sup>31</sup> Thus, this definition of Aboriginal rights suggests a consolidation of Aboriginal and European “cultures” and legal perspectives “that evolved from

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<sup>28</sup> *Ibid* at para 40.

<sup>29</sup> *Ibid* at para 73 [emphasis added].

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* at para 42.

long-standing practices linking the various communities.”<sup>32</sup> On the other hand, he also maintains that if the objectified practice, custom or tradition “arose solely” in response to European “influences” that this would not meet the standard for s. 35(1) protection.<sup>33</sup> This approach contradictorily asserts that Aboriginal rights cannot bridge, incorporate or be a consolidation of Aboriginal and European cultures. It cannot be intersocietal. Thus, although we are not yet dealing with a right in this context, we see another way in which the Court’s characterization test freezes the lives of Aboriginal peoples through Eurocentric tunnel history: while the Court “allows” fluidity of culture in theory, the cultural “inventory” must remain constant—or “continuous.” This, as I will discuss in what follows, effectively denies most claims to a commercial Aboriginal right, for example, “given,” as the Court stated in *R. v. Gladstone*, “the link between the notion of commerce and the introduction of European culture.”<sup>34</sup>

Although this “adapt but not arise” (or “adapt in response”) creates its own difficulties, the possibly more significant issue is with regards to the latter: the heading for the discussion of European influence in *Van der Peet* suggests that European influence is only relevant if it caused the objectified practice, custom or tradition to become integral to the claimant’s ancestors’

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<sup>32</sup> *Ibid*, quoting Brian Slattey, “The Legal Basis of Aboriginal Title” in Frank Cassidy, ed, *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books & The Institute for Research on Public Policy, 1992) 113 at 120-21. For example, in *Gladstone*, Lamer, at paras 26-27, found that the post-contact evidence of Europeans, rather than direct evidence of pre-contact activities, of established and extensive trade networks demonstrated that the trade in herring spawn on kelp was “on a scale best characterized as commercial [and] was an integral part of the distinctive culture of the Heiltsuk” prior to contact. Lamer agreed that this evidence also supported the claim that this exchange and trade supplied the Heiltsuk with money or other goods for the necessities of life, particularly other food products. This evidence presented and accepted in this case was held, at para 28, to be “precisely the type of evidence which satisfies” the requirement of “continuity” described in *Van der Peet* (SCC), and so the Court determined that the contemporary exchange of herring spawn on kelp for money or other goods and/or the sale or trade of herring spawn on kelp in the commercial marketplace were continuous with defining features of the distinctive pre-contact culture of the Heiltsuk. As I will discuss further below, though, note again that this positive ruling was still based on Eurocentric criteria and *not* an intersocietal weaving of Aboriginal and non-Aboriginal “legal cultures.”

<sup>33</sup> *Van der Peet* (SCC), *supra* note 1 at para 73.

<sup>34</sup> *Supra* note 11 at para 28.

culture. In other words, their ancestors became too European or intersocietal.<sup>35</sup> And while, over the course of life, some practices, customs or traditions may become more prominent, they are still inextricably part of the meshwork of life. Thus, to suggest that a practice, custom or tradition became more or less “integral” is only possible by inverting culture into a collection or inventory of “atoms.”

“Arising solely” and becoming “integral” in response to Europeans implies two separate things though: the former suggesting that the objectified practice, custom or tradition was introduced and has/had no pre-contact correlate, while the latter suggests that there was a pre-contact correlate but that its “significance” increased. While these are not mutually exclusive, or contradictory, the problem for Aboriginal litigants is that, depending on the circumstances, the courts use both. Again, then, the common law ideals of certainty and predictability vanish, replaced by a case-by-case lottery, and a judicial arbitrariness that is contrary to the principles of fundamental justice.

### **III. Continuity and the Dynamics of Subsistence Pizza**

Though “European influence” is a vague concept with multiple interpretations by the judiciary,<sup>36</sup> there appears to be a correlation between the “arising solely” approach to this influence, and arguments and conclusions where there is an implied questioning of the authenticity of the objectified practice, custom or tradition, or of the Aboriginal claimants or their ancestors. While a favoured strategy of Crown lawyers is to bring into question the testimony and credibility of Aboriginal witnesses, we find instances of the same line of reasoning by the Court. The “pizza test” appellation arose during the British Columbia Supreme Court (BCSC) proceedings in

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<sup>35</sup> Or, to adopt the language used in the preceding chapters, the “distance” between their ancestors and Europeans became too small.

<sup>36</sup> As I discuss further below. See text accompanying note 76 and following.

*Delgamuukw v. BC*<sup>37</sup> where the lawyers for the Crown argued that the fact that the Gitksan and Wet'suwet'en have members who have jobs in the wage economy, use "Western" technologies, go to public schools, or, among others, they eat "white food" "proves" that the claimants are assimilated, and therefore inauthentic, and not eligible for s. 35(1) protection.<sup>38</sup> "Following this line of reasoning," anthropologist Dara Culhane writes, "it has been commonplace for Aboriginal witnesses to be questioned about how many times they have eaten Kentucky Fried Chicken, Big Macs and pizza, for example."<sup>39</sup> McEachern C.J. appears to have found this form of argument persuasive, as he used the participation of *most* Gitksan and Wet'suwet'en in the wage economy as evidence that they "do not now live an aboriginal life" (if that, as McEachern seems to conceive it, is at all possible in the contemporary).<sup>40</sup>

The dispositionism is blatant in this argument, but the same line of reasoning underlies Justice Bastarache's holding that there is only an Aboriginal right to a traditional *means* of sustenance, not to sustenance.<sup>41</sup> Thus, catching salmon "traditionally" can be an Aboriginal right, but there is no Aboriginal right that would allow Aboriginal peoples to eat at a restaurant (particularly with moneys raised through fishing) like any other Canadian. So while Bastarache *appears* to alter the *Van der Peet* test so that practices undertaken for survival purposes could

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<sup>37</sup> [1991] 5 CNLR 1 (BCSC) [*Delgamuukw* (BCSC)].

<sup>38</sup> See e.g. Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talonbooks, 1998) at 229. See too Barbara Williamson, "The Pizza Syndrome" (1989) 1:3 Project North BC Newsletter 1. Such arguments are not limited to British Columbia either: in their intervenor factum for *Sappier* the Attorney General of Nova Scotia, citing both *Van der Peet* and *Mitchell v MNR* ([2001] 1 SCR 911 at para 12 [*Mitchell*]), argued that because the Mi'kmaq and Maliseet readily adopted European technologies—"that after contact the *material culture*... was transformed"—in the place of "traditional" (read: authentic) objects (including ATVs, motorboats and *blankets*), that this somehow opens up to questioning "native use of wood." FoNS, *supra* note 26 at para 17 [emphasis added]. This passage from their factum also highlights the problem Lamer C.J. created: as after questioning whether metal hatchets permitted wider uses of wood, the Attorney General of Nova Scotia reminds the Court that *Van der Peet* "instructs that practices arising as a response to European influences are not aboriginal rights." *Ibid.* So if the hatchets actually produced wider uses of wood, would this then mean that "uses of wood" were in response to European influence or only some uses?

<sup>39</sup> Culhane, *supra* note 38 at 229.

<sup>40</sup> *Delgamuukw* (BCSC), *supra* note 37 at 47. Note also how McEachern essentializes and dispositionalizes the participation of most—but not all—into a cultural "whole."

<sup>41</sup> *R v Sappier; R v Gray*, [2006] 2 SCR 686 at para 37 [*Sappier*].



possibly considered “integral” to a culture,<sup>42</sup> little is changed. In fact, Bastarache further entrenched objectified practices, customs and traditions as the sole focus of Aboriginal rights. Dispositionism thereby flourishes as “survival purposes” is rendered inconsequential to determinations of integrality. Again Aboriginal rights become lifeless, perpetuating the “pizza test” calculus.

This general view of what I have been referring to as the “pizza test” calculus parallels acculturation theory in anthropology. This theory is based on the assumption that, for our concerns, post-European contact change “was driven primarily by great differences in technological sophistication between the two and the motivation of aboriginal people to therefore acquire goods provided by Europeans.”<sup>43</sup> The theory is also premised on the belief that Aboriginal peoples will become, unquestionably, fully assimilated into the dominant polity, economy, and society, thereby (again) appropriating the agency and creativity of Aboriginal peoples that is part and parcel of life.<sup>44</sup> Eating pizza, having “adequate” housing or business ventures become dispositionalized as assimilation and thereby no longer qualifying for special constitutional protection. Again we can see how determinations of Aboriginal rights are, at the same time, determinations of authenticity due to the definition of these rights through objectified practices, customs and traditions that facilitates the “pizza test” calculus.

Moreover, this calculus bolsters and legitimizes the power asymmetry of the belief that Euro-Canadians can change and adapt while Aboriginal peoples cannot. The use of eating pizza

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<sup>42</sup> *Ibid* at para 37.

<sup>43</sup> Michael Asch, “Errors in *Delgamuukw*: An Anthropological Perspective” in Frank Cassidy, ed, *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books & The Institute for Research on Public Policy, 1992) 221 at 232. Though, as I will discuss below, in the context of fishing the belief that European technologies were notably more “sophisticated” is questionable.

<sup>44</sup> Ebert, *Different Canoe*, *supra* note 10 at 10. And because all Aboriginal peoples are always assumed to be somewhere along the path towards full acculturation, the reasons for their current political, legal, and cultural conditions are marginalized due to a supposed state of “purity” before European contact. *Ibid*. Again, the invisible hand and situational influence of colonialism remains hidden.

for sustenance as a dispositionalized marker of assimilation, and therefore as a gauge of authenticity, is a particularly egregious and absurd illustration of the conceit of Eurocentric tunnel history. Pizza did originate in Naples and consisted of flattened bread dough, topped with olive oil, mozzarella cheese, and tomatoes,<sup>45</sup> and arrived in America around the end of the nineteenth century with southern Italian immigrants.<sup>46</sup> Yet if tomatoes are an integral ingredient to pizza—making it “what it is”—then pizza actually reflects *Indigenous* influence: as Europeans, similar to with tobacco discussed in the last chapter, came into contact with the plant only when they arrived in Central America.<sup>47</sup> In other words, *tomatoes were introduced to Europeans by Indigenous peoples!* But because Eurocentric culture and categorical thought are naturalized, Eurocentric tunnel history becomes paradoxically atemporal, reproducing the power asymmetry that views Europeans as “makers of history”—eternally advancing, progressing and modernizing—while non-Europeans remain “shackled” in tradition, stagnant and only contributing to history as a result of European influence.<sup>48</sup> Thus, the tomato contributed to “history” but did not “make” it,<sup>49</sup> allowing the plant to be co-opted by a retrospective social attribution, erasing the contribution of Indigenous peoples, and, as a result, pizza becomes part of a calculus that contrasts the imagined pre-contact with the present, with differences being ascribed as “arising solely” from European influence, reducing cultural dynamics to the self-anointed “makers of history.”

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<sup>45</sup> *The New Encyclopædia Britannica*, 15th ed, *sub verbo* “pizza” at 490.

<sup>46</sup> Robert W Brower, “Pizza” in Andrew F Smith, ed, *The Oxford Encyclopedia of Food and Drink in America*, vol 2 (Oxford: Oxford University Press, 2004) 286 at 286.

<sup>47</sup> Andrew F Smith, “Tomatoes” in Andrew F Smith, ed, *The Oxford Encyclopedia of Food and Drink in America*, vol 2 (Oxford: Oxford University Press, 2004) 545 at 545.

<sup>48</sup> See e.g. JM Blaut, *The Colonizer’s Model of the World: Geographical Diffusion and Eurocentric History* (New York & London: The Guilford Press, 1993) at 1, 4-5 [Blaut, *Colonizer’s Model*]. This is also an instance of “telescoping history.” See text accompanying note 187 below.

<sup>49</sup> In the next chapter I will discuss how the Court approaches Aboriginal rights, in particular, as things that are similarly “made” as this too contributes to the lifelessness of their approach.

#### **IV. Integral to a Distinctive Trade or Commerce**

Moreover, because Aboriginal rights arise from Aboriginality,<sup>50</sup> the “pizza test” calculus of Eurocentric modernity, via the second, external Great Divide, again adds a “cultural distance” as a fatal component to proving Aboriginal rights. Thus, the aforementioned link between Europeans and commerce, and the latter’s trait of the accumulation of wealth,<sup>51</sup> results in “the economic status and wealth of First Nations ... being used as a barometer to determine an appropriate scope or level of protection for ... Aboriginal rights.”<sup>52</sup> Although a section 15 case that was reversed by the SCC,<sup>53</sup> nowhere is this view perhaps more evident than in Provincial Court Justice Kitchen’s ruling in *R. v. Kapp*,<sup>54</sup> where he concluded, in agreement with the defence’s arguments, that the ameliorative pilot sales fisheries program—a federal program that arose in response to the governmental obligations resulting from the *Sparrow* decision<sup>55</sup>—was “offensive as being analogous to racial discrimination”<sup>56</sup> based on the “fact” the particular bands that were the focus of the case had adequate housing, as an example, and were not relatively financially disadvantaged.<sup>57</sup> By taking a relative lack of disadvantage, Kitchen evinced dispositionism, as he ignored the situational forces of federal avoidance and ignoring of

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<sup>50</sup> *Van der Peet* (SCC), *supra* note 1 at para 19.

<sup>51</sup> See e.g. *R v Marshall*, [1999] 3 SCR 456 at paras 7, 59 [*Marshall*].

<sup>52</sup> André Goldenberg, “‘Salmon for Peanut Butter’: Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights” (2004) 3 Indigenous LJ 61 at 97 [Goldenberg, “Salmon”].

<sup>53</sup> *R v Kapp*, [2008] 2 SCR 483 [*Kapp* (SCC)].

<sup>54</sup> [2003] 4 CNLR 238 (BC Prov Ct) [*Kapp* (BCProvCt)]. André Goldenberg has asserted that this ruling has implications, depending on how the appeals went, for Aboriginal rights: “The recent *Kapp* decision has the potential to fundamentally alter, for better or for worse, our understanding of the nature of Aboriginal rights disputes in Canada and how such rights interact with other constitutionally-protected rights in the *Charter*.” “Salmon”, *supra* note 52 at 109.

<sup>55</sup> See e.g. *Kapp* (BCProvCt), *supra* note 54 at para 35; Peter H Pearce, *Managing Salmon in the Fraser: Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation* (Vancouver: Department of Fisheries and Oceans, 1992) at 13-14 [Pearce, *Managing Salmon*]; Parnesh Sharma, *Aboriginal Fishing Rights: Laws, Courts, Politics* (Halifax NS: Fernwood Publishing, 1998) at 56-59.

<sup>56</sup> *Kapp* (BCProvCt), *supra* note 54 at para 234. The accused were mainly non-Aboriginal commercial fishers.

<sup>57</sup> See e.g. *ibid* at paras 193-94, 197-98.

Aboriginal rights to fish that marginalized Aboriginal fisheries<sup>58</sup>—again pushing the “European influence” of the colonial power asymmetry to the background.

Furthermore, by dispositionalizing the supposed relative lack of disadvantage, the differences between Aboriginal fishers participating in the pilot program and the non-Aboriginal fishers is thereby reduced to racial differences because the supposed “distance” between elements of the cultures of the two parties is narrowed. Race, then, appears to be the only criteria remaining from which to discriminate the parties.<sup>59</sup> Provincial Court Justice Kitchen’s conclusions in *Kapp* accords with Adam Benforado and Jon Hanson’s point about the current “color blind” dispositionism to explain disparities between culturally and historically defined groups:

[T]he emergent conventional wisdom over the last third of the twentieth century is a ‘color blind’ dispositionist account (sometimes supplemented with naïve situationism) that is widely accepted and that helps to legitimate differing outcomes across different groups: individuals are relatively successful or unsuccessful, rich or poor, and powerful or weak, as a result of the choices that they make. Racism can be controlled because it, similarly, is the product of conscious and self-regulated thoughts and choices.<sup>60</sup>

Thus Kitchen found the ameliorative fisheries program to be “government sponsored” discrimination akin to the discriminatory legislations from the first half of the twentieth century.<sup>61</sup> The evidence Kitchen relied upon to determine the relative disadvantage also reveals that he too supplemented his “colour blind” dispositionism with naïve situationism: as this

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<sup>58</sup> With regards to dispositionism, see e.g. Jon Hanson & Kathleen Hanson, “The Blame Frame: Justifying (Racial) Injustice in America” (2006) 41 Harv CR-CLL Rev 413 at 444. With regards to the marginalization of Aboriginal fisheries, see e.g. Douglas C Harris, *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008) at 164 [Harris, *Landing Native Fisheries*].

<sup>59</sup> *Kapp* (BCProvCt), *supra* note 54 at para 203.

<sup>60</sup> Adam Benforado & Jon Hanson, “Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights” (2008) 57 Emory LJ 1087 at 1129 [footnote omitted].

<sup>61</sup> *Kapp* (BCProvCt), *supra* note 54 at para 235. Kitchen’s admonishment here exhibits one of the other aspects of dispositionism discussed here in chapter 2 in the context of the dispositionism of Justice Hall in *Calder v Attorney-General of British Columbia* ([1973] SCR 313 [*Calder*]): “After such a sad history, our governments should be much more sympathetic to these issues than has been the case here. When racial discrimination or a semblance of it is identified, any continuance of it should not be permitted.” *Kapp* (BCProvCt), *supra* note 54 at para 235.

“limited (and often motivated) attentiveness to ‘situation’” involves the consideration of only the most salient situational factors.<sup>62</sup> Consequently, testimony and photographs of the current “situation” of the participating bands are considered relevant, again wiping out the historical situational influences that eventually produced the pilot program.

The becoming “an element of a practice, custom or tradition integral to the distinctive culture” of an Aboriginal nation, society, culture or community as a result of European influence manifests the same power asymmetry. This approach to European influence is perhaps a more complicated calculus on the part of the Court: while the “pizza test” calculus is seemingly more straightforward in that it mainly involves the exploration of the past to discover whether a pre-contact cognate exists, the “integral” approach involves an additional hurdle to the standard integrality test. In this aspect of the integral test the Court has to determine whether an objectified practice, custom or tradition was integral, but they must also determine when that “integrality” began. This likewise serves to further re-entrench the power asymmetry of Eurocentric tunnel history and colonialism.

So, for example, while *R. v. Sappier; R. v. Gray* suggested, as noted above, that traditional means of sustenance could qualify as an Aboriginal right, and while the Court has acknowledged that the potlatch complex on the Northwest Coast was a pre-contact venue in which trade occurred,<sup>63</sup> it seems that once Aboriginal peoples traded foodstuffs with European fur traders that this was somehow different and not attributable (authentic) to pre-contact Aboriginal culture.<sup>64</sup> Justice Satanove, in *Lax Kw’alaams Indian Band v. Canada (AG)*, even states that while the Coast Tsimshian supplied sustenance to the HBC and marine fur traders, in “relatively large volumes,” these volumes were still not in large enough quantities to be

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<sup>62</sup> Hanson & Hanson, *supra* note 58 at 426, n 50.

<sup>63</sup> See e.g. *Lax Kw’alaams* (BCSC), *supra* note 16 at para 495.

<sup>64</sup> *Ibid* at para 434.

marketed commercially—although still large enough to create a “market and exchange system.”<sup>65</sup> Satanove even mentions that “the demand for salmon was never sufficient for HBC to market it commercially,” making one question Satanove’s understanding of the market principles she is supposedly applying to the Lax Kw’alaams, as we can see that the fault for the relative “low” volume of exchange (but still large enough to create a market system) is due to the *demand of the Europeans*. Moreover, even though Satanove acknowledges that “[p]re-contact trade relationships, ... were founding principles upon which the European fur trade was built,”<sup>66</sup> implying they were the “founding principles” for *all* post-contact trade, she maintains that it was a difference in kind, *not* degree. Yet if this was a difference in kind—meaning that Aboriginal peoples engaged in practices, customs or traditions different from Europeans—this negates the idea of European influence, which arises only when they are the same. Since the different practice, custom or tradition was an integral part of the, in this case, Lax Kw’alaams community’s culture or law prior to contact with Europeans<sup>67</sup> and continued after the arrival of Europeans, “European arrival and influence *cannot* be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right.”<sup>68</sup> Satanove explicitly accepts continuity in trade in this last passage, and therefore that trade did not “arise solely” due to European influences, she goes on to directly contradict this by concluding that “this is a prime example of an activity that came about ‘solely as a response to European influences’.”<sup>69</sup> It is difficult not to see this contradiction as ethnocentric at best, or racist at worst.

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<sup>65</sup> *Ibid* at paras 433-34.

<sup>66</sup> *Ibid* at para 356.

<sup>67</sup> *Ibid* at para 435.

<sup>68</sup> *Van der Peet* (SCC), *supra* note 1 at para 73 [emphasis added].

<sup>69</sup> *Lax Kw’alaams* (BCSC), *supra* note 16 at para 434.

The irony of this conclusion is twofold: first, Satanove J. writes in the same paragraph that it was “the fur traders’ *necessity of sustenance*”<sup>70</sup> from which the *sui generis*<sup>71</sup> or distinctive Coast Tsimshian market and exchange system enfolded does not qualify as a “market and exchange system.” This distinctiveness, though, is crucial to Aboriginal laws and legal systems on the Pacific coast via the central and integral institution of the potlatch complex. However, Satanove ignored this distinctiveness, asserting that it does not qualify as a “market and exchange system.” Europeans can have a privileged market exchange for sustenance (and therefore for survival) but not Aboriginal peoples.<sup>72</sup> Second, Satanove cites paragraph 73 of *Van der Peet*<sup>73</sup> for this “arising solely,” yet this point in *Van der Peet* is preceded—in the same paragraph—with the assertion that “[i]f the practice, custom or tradition was an integral part of the aboriginal community’s culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, *and adapted in response to their arrival*, is not relevant to determination of the claim.”<sup>74</sup> Surely the fact that pre-contact Coast Tsimshian trade relationships formed the distinctive “founding principles” for trade with Europeans represents an enfolding of or adaptation to the arrival of Europeans. But this judicial

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<sup>70</sup> *Ibid* [emphasis added]. A further irony is that apparently the first “commercial” salmon export from what is now British Columbia was to Hawaii to meet the demand of the *Indigenous* peoples there! See e.g. Richard Somerset Mackie, *Trading Beyond the Mountains: The British Fur Trade on the Pacific, 1793-1843* (Vancouver: UBC Press, 1997) at 197, 225.

<sup>71</sup> Chief Justice Lamer, in *Delgamuukw v British Columbia*, observed that Aboriginal title is *sui generis* because its source arises from pre-existing Aboriginal occupation and from “the relationship between common law and pre-existing systems of aboriginal law.” [1997] 3 SCR 1010 at para 114 [*Delgamuukw* (SCC)].

<sup>72</sup> Satanove does allude to Justice Bastarache’s comment regarding activities undertaken for survival purposes and Aboriginal rights, but appears to interpret it in a negative manner: “I am aware of Justice Bastarache’s comment in *R. v. Sappier* that a survival activity is usually not (although sometimes can be) a distinctive element of a society.” *Lax Kw’alaams* (BCSC), *supra* note 16 at para 436. (Compare with Bastarache’s actual comment: “Rather, these cases stand for the proposition that the traditional *means* of sustenance, meaning the pre-contact practices relied upon for survival, can in some cases be considered integral to the distinctive culture of the particular aboriginal people” (*Sappier*, *supra* note 41 at para 37)—surely interpreting “in some cases” as “usually not” creates a heightened threshold.) Satanove then goes on to highlight her superficial understanding of the potlatch complex (or the paucity of evidence introduced by the lawyers) and exchange by converting the role of food in Coast Tsimshian culture to a sales activity limited solely to “occasional periods of famine.” *Lax Kw’alaams* (BCSC), *supra* note 16 at para 436.

<sup>73</sup> Satanove actually cites page 562 of the judgment and not to a paragraph number for some reason.

<sup>74</sup> *Van der Peet* (SCC), *supra* note 1 at para 73 [emphasis added].

attempt at demarcation illustrates one of the problems with Chief Justice Lamer's discussion of the vague concept of European influence that results from the Eurocentric conception of cultural dynamics and tunnel history.

## **V. Evolution in a Cultural World**

The biases and contradictions in the Court's attempts to sharpen their indeterminate borderline approach to, for our current concerns, distinctive trade systems and laws are exacerbated when they attempt to apply either Chief Justice Lamer's doctrine of discontinuous evolution or the newer doctrine of logical evolution—particularly in the contexts of commercial Aboriginal rights. Yet what “arising solely” and becoming integral both have in common is the rupturing of continuity and, therefore, of life as they involve an inversion of life processes in a dynamic world into a discourse of assimilation and acculturation produced by Eurocentric tunnel history that is really nothing more than a sleight of hand that conceals colonial power asymmetries.

Given the prominence of Eurocentric tunnel history, to begin discussing the doctrine of logical evolution we must continue to interrogate the issue of “European influence,” and what the Court means by it, as, again, the arrival of Europeans is taken as critical to the judicial analysis of the rights of Aboriginal peoples. Because the Court ruled that Aboriginal rights are intersocietal and determined on a “case-by-case” issue (again, thereby circumventing, when convenient, *stare decisis*), most, if not all, Aboriginal rights rulings include a discussion about what date should be used as “contact” (the cut off point).<sup>75</sup> Often this plays out as an issue of what counts as “contact.”

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<sup>75</sup> Again privileging the Eurocentric over the Aboriginal, in this case regarding conception of time and what, or when, is significant in terms of European influence.



The debate over defining “contact” again betrays the materialism and dispositionism of the Court’s approach as the moment a single European arrives in the general region,<sup>76</sup> regardless of whether anyone was around or they are “just words blowing in the wind,”<sup>77</sup> that is taken as the significant moment—even if they are simply enfolded into continuing practices. This is the problem with Justice Satanove’s discussion above:<sup>78</sup> the suggestion that market exchange was wholly introduced by European traders implies that this form of exchange was entirely foreign and different in kind;<sup>79</sup> yet how then could pre-contact distinctive “founding principles” of the Lax Kw’alaams system of trade enfold Europeans and the incorporation “within traditional indigenous trading spheres” be influenced by European traditions?<sup>80</sup> Although Satanove limited this latter incorporation to the “initial” part of the fur trade and ignores the continuation, resiliency and resurgence in contemporary society,<sup>81</sup> such a limitation freezes Aboriginal life as it continues to anchor Lax Kw’alaams trade in the pre-contact, disjoining and atomizing trade and cultural dynamics. In other words, instead of looking at the continuity and ontogenetic development of life, all “change” (and “continuity”) is determined by abstractive reference back to the pre-contact, as defined by a European person. Setting aside the issue of whether life is

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<sup>76</sup> “General region” in the contexts of British Columbia sometimes even means anywhere in what came to be the province! See e.g. *Tsilhqot’in Nation v British Columbia*, [2008] 1 CNLR 112 at para 1212 [*Tsilhqot’in*], where Justice Vickers sets 1793 as the date of contact for *all* of mainland British Columbia (or, as written in the judgment, “New Caledonia”).

<sup>77</sup> Perhaps ironically, given the preceding note, this quoted phrase is also from *Tsilhqot’in*. *Ibid* at para 596. Furthermore, as discussed in the last chapter, both *Van der Peet* (SCC) and *Gladstone* held that “contact” was when Europeans arrived in North America, regardless of which coast—pushing “European influence” back almost two hundred years before any recorded direct contact on coastal British Columbia.

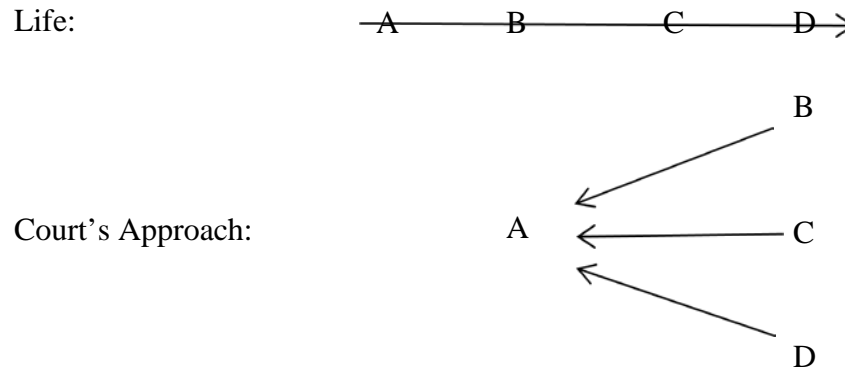
<sup>78</sup> See text accompanying note 66.

<sup>79</sup> Similar to above, if the Aboriginal system of trade and exchange is distinct and different in kind from the European concept of trade or commerce, then could this be a limitation on the notion of European influence given the Court’s assertion in *Van der Peet*, at para 73, that European influence is relevant only if “*the same* practices, customs or traditions” existed because of that influence.” *Supra* note 1 [emphasis added].

<sup>80</sup> *Lax Kw’alaams* (BCSC), *supra* note 16 at para 356.

<sup>81</sup> See e.g. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

linear, we can represent this issue thusly (where A = pre-contact, and B, C, D represent post-contact “snapshots”):



In this we can see yet again how the lateral movement of life is fragmented and inverted by the Court, erasing life, and making each moment a bounded, isolated instance that can then be compared back (or forward) to another instance, leap-frogging time and the continuity of life so that while early post-contact trade was founded on pre-contact trade, Aboriginal–European trade that followed can be disjoined from life and compared to the “pristine” pre-contact. This is the same logic that allowed Lamer C.J. to suggest that the concept of continuity does not necessarily mean continuous:

I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right.<sup>82</sup>

This sense of discontinuous continuity then, is not in terms of overlapping lived lives but rather in terms of faithfulness or correspondence between a particular instant and the pre-contact past.

<sup>82</sup> *Van der Peet* (SCC), *supra* note 1 at para 65.

Moreover, this fragmentation of time converts “European influence” from something that denotes actual, significant influence or even interaction or interferences—however that is/could be adjudged<sup>83</sup>—into a point in time. Again we find another instance of how the “Aboriginal” in Aboriginal rights has a temporal aspect, and one that implies, specifically, “non-/pre-European.”

The introduction of “proto-contact” into the deliberations in *Lax Kw’alaams*, Justice Satanove was following this line of reasoning by the Court to its erroneous end: if interacting with (or the physical appearance of) a European is taken as a defining moment, and if objectified practices, customs, traditions, or material instantiations of them are taken as representative of an entire “culture,” then, through the logic of inversion and dispositionism, Aboriginal peoples in possession of European goods and technologies *must* be influenced by Europeans and have begun the process of acculturation. In other words, this is the same paradoxical logic that underlies the “pizza test.” Thus, instead of allowing Aboriginal peoples agency, creativity and resiliency that is part and parcel of being alive in an ever unfolding existence, situation and world, “European influence” further limits Aboriginal rights that have already been limited by “culture.” And while Lamer C.J. suggested that the concept of continuity “unfroze” Aboriginal rights,<sup>84</sup> this forces Aboriginal peoples to prove continuity through relative fidelity between the past and the present conceived as atomized moments that can be directly compared instead of as part of an evolution of an intersocietal Aboriginal rights. This inversion of life and time in the Court’s approach creates significant problems and barriers to Aboriginal rights when the doctrine of logical evolution is applied.

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<sup>83</sup> Perhaps it is this difficulty—of when is change, “change”—that informs why the Court adopts its approach. As discussed throughout this thesis, Eurocentric thought reduces continuity to a problematic change–non-change dichotomy. Thus, not only does fragmentation structure how the world is perceived, it also simplifies discussions of continuity and change by allowing isolated moments to be compared instead of being linked in an ever unfolding and enfolding meshwork of life.

<sup>84</sup> *Ibid* at para 64.

In *Van der Peet*, the SCC denied Mrs. Van der Peet's claim to an Aboriginal right that the Court characterized as being to exchange fish for money or other goods because the Stó:lō were held to be at a "band" level of social organization.<sup>85</sup> In so doing, Lamer C.J. accepted the trial judge's categorical thought in which the category of "band" did not include a cognizable "market system of exchange."<sup>86</sup> Further, while Lamer accepted that "fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture," he denied that the exchange system was integral by finding that the exchange of fish was incidental to the fishing (then formulated as a custom).<sup>87</sup> Importantly, though, Lamer *rejected* Mrs. Van der Peet's characterization of her claim to sell fish to provide a "moderate livelihood" because, apparently, the "use of the fishery, and the practices, customs and traditions surrounding that use" were *not* "actual practices, customs and traditions related to the fishery."<sup>88</sup> This rejection of Mrs. Van der Peet's characterization is problematic and confusing. If significance to the culture is not controlling in defining an Aboriginal right, but its integrality to a distinctive culture is,<sup>89</sup> then why did Lamer give any importance (significance) to the "incidentalness" of the exchange of fish to the fishery? When is a *sui generis* or distinctive practice, custom or tradition not an actual practice, custom or tradition?

Again highlighting Chief Justice Lamer's confusion over characterization and the time period to look at, he asserts that one factor to look at to "correctly" characterize the actual

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<sup>85</sup> *Ibid* at paras 90-91. See also Michael Asch, "Calder and the Representation of Indigenous Society in Canadian Jurisprudence" in Hamar Foster, Heather Raven and Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 101 at 107-08.

<sup>86</sup> *Van der Peet* (SCC), *supra* note 1 at paras 7, 84.

<sup>87</sup> *Ibid* at para 86. Justice McLachlin's dissent, *ibid* at paras 247-48, provides an approach that resonates better with the "simple fact" and "essence" of Aboriginal rights identified by Lamer: "I cannot agree with the Chief Justice, however, that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question."

<sup>88</sup> *Ibid* at para 79.

<sup>89</sup> *Ibid* at paras 52, 58.

activities engaged in and the precise nature of the Aboriginal right claim being made is “the nature of the governmental regulation, statute or action being impugned”<sup>90</sup> or infringing on the claimed right. This analysis is supposed to ensure that the Court’s characterization and inquiry is tailored to the actual activities of the claimants and their ancestors. If claims to Aboriginal rights are founded on pre-contact, objectified practices, customs or traditions, what insights can governmental regulations, statutes or actions provide to the characterization of these activities? Such an approach, though, reflects part of the Court’s confusion over the essence of Aboriginal rights being their bridging of Aboriginal and non-Aboriginal “cultures,” which is neither English nor Aboriginal in origin.<sup>91</sup> Yet even this definition (“essence”) of Aboriginal rights is contradictory: as it is rejected by the theory underlying the continuity test and the limitation of European influence on rights. Moreover, using such regulations etc. as part of the characterization of the claim directly conflicts with what the Court held in *Sparrow*: “an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.”<sup>92</sup> Any involvement of “government” etc. are post-contact phenomenon, and, therefore, following the Court’s own doctrines and tests, they can have nothing to do with the characterization of a claim to an Aboriginal right. If “European influence” can result in the denial of a claim for s. 35(1) protection, then how can it also be part of characterizing the same claim?

Again, this paradox is inherent in the Court’s conception of the intersocietal nature of Aboriginal rights. The notion that Aboriginal peoples (of British Columbia at least) only fished for food, social or ceremonial purposes is a relic of the 1888 amendments to the *Fisheries Act* which restricted the “Indian” salmon fishery “to fish for the purpose of providing food for

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<sup>90</sup> *Ibid* at para 53.

<sup>91</sup> *Ibid* at para 42.

<sup>92</sup> *Sparrow*, *supra* note 2 at 1091.

themselves but not for sale, barter or traffic.”<sup>93</sup> The use of the category of “band” and the 1888 amendment to fishery regulations in British Columbia—which created the *legal category* of “food fishery”<sup>94</sup>—then both reflect the same assumption: that pre-contact Aboriginal peoples were “simple” and lived a “sustenance lifestyle”—distinguishing them from the “commerce-minded Euro-Canadians.”<sup>95</sup> This assumption, though, again conflicts with *Sparrow* and, in this context, its interpretation of these federal acts and regulations as “simply a manner of controlling the fisheries, not defining underlying rights.”<sup>96</sup>

In *Gladstone*, when faced with regulations that prohibited all sale or trade in herring spawn on kelp without a Category J licence, the Court created two possible, reasonable characterizations: the claim could be characterized as aimed at the exchange of herring spawn on kelp for money or other goods, or as commercial in nature.<sup>97</sup> Lamer C.J. suggested that the “means to resolve this difficulty in characterization, as was the case in *N.T.C. Smokehouse*, is by addressing both possible characterizations of the appellants’ claim.”<sup>98</sup> Based on the evidence of pre- and post-contact exchange and trade, the Court held that the “facts supports the appellants’ further claim that the exchange of herring spawn on kelp on a scale best characterized as

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<sup>93</sup> *Fishery Regulations for the Province of British Columbia*, s 1, Order-in-Council, 26 November 1888, *Canada Gazette*, vol 22 at 956. See also Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada’s Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993) ch 3 [Newell, *Tangled Webs*] and Harris, *Landing Native Fisheries*, *supra* note 58 at 106-11 for further discussion of the creation of the “Indian food fishery.” In *Sparrow*, the Court asserted that a “constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982. Far from being defined according to the regulatory scheme in place in 1982, the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery’s expression, in ‘Understanding Aboriginal Rights,’ *supra*, at p. 782, the word ‘existing’ suggests that those rights are ‘affirmed in a contemporary form rather than in their primeval simplicity and vigour.’ Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate ‘frozen rights’ must be rejected.” *Sparrow*, *supra* note 2 at 1093.

<sup>94</sup> Harris, *Landing Native Fisheries*, *supra* note 58 at 4.

<sup>95</sup> Newell, *Tangled Webs*, *supra* note 93 at 62. The idea of “sustenance lifestyle” and pre-contact Aboriginal peoples has been used by the Court in *Gladstone* (*supra* note 11 at paras 164-65) and *Marshall* (*supra* note 51 at paras 59-60) to limit fishing rights.

<sup>96</sup> *Sparrow*, *supra* note 2 at 1099.

<sup>97</sup> *Gladstone*, *supra* note 11 at para 24.

<sup>98</sup> *Ibid.*

commercial was an integral part of the distinctive culture of the Heiltsuk.”<sup>99</sup> The prohibitory regulations did not sever the discontinuous continuity of the pre-contact activities into the contemporary “commercial marketplace.”<sup>100</sup>

When we consider the newer doctrine of logical evolution, introduced in the *R. v. Marshall*; *R. v. Bernard* case, though—particularly in the contexts of commercial Aboriginal rights to fish—a number of issues arise (especially for Aboriginal claimants). The Court has defined logical evolution as “the same sort of activity, carried on in the modern economy by modern means.”<sup>101</sup> They define it thusly so as to supposedly prevent “aboriginal rights from being unfairly confined simply by changes in the economy and technology.”<sup>102</sup> “But,” McLachlin C.J. added, “the activity must be essentially the same.”<sup>103</sup> She does not address, though, the situation where the activities are distinctive or *sui generis*. So while the economy and technology can change, the *activity* must remain the same, begging the question of why in *Van der Peet*, for example, was Mrs. Van der Peet’s claim again not characterized as a right to sell fish. As Doug Harris and Peter Millerd argue in the contexts of Aboriginal rights to fish and fisheries management, “so far as conservation is concerned, it makes no difference whether the

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<sup>99</sup> *Ibid* at para 26.

<sup>100</sup> *Ibid* at paras 34-38. “The Heiltsuk were, both before and after contact, traders of herring spawn on kelp. Moreover, while to describe this activity as ‘commercial’ prior to contact would be inaccurate given the link between the notion of commerce and the introduction of European culture, the extent and scope of the trading activities of the Heiltsuk support the claim that, for the purposes of s. 35(1) analysis, the Heiltsuk have demonstrated an aboriginal right to sell herring spawn on kelp to an extent best described as commercial.” *Ibid* at para 28.

<sup>101</sup> *Marshall; Bernard*, *supra* note 5 at para 25. This is a different test/doctrine than Chief Justice Lamer’s discontinuous continuity of resilient traditions. See e.g. *Van der Peet* (SCC), *supra* note 1 at para 65; *Delgamuukw* (SCC), *supra* note 71 at para 153. Logical evolution, as discussed below, is another imaginative process. This time about logical or abstract states of affairs, which are not contingent upon the Aboriginal perspective nor anything empirical. See e.g. Edmund Husserl, *Logical Investigations*, translated by JN Findlay (London: Routledge and Keegan Paul, 1970) at 99-100. See also *Delgamuukw* (SCC), *supra* note 71 at para 85 (quoting from volume 1 of the *Report of the Royal Commission on Aboriginal Peoples (Looking Forward, Looking Back)*: “The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one — and not necessarily the most important — element of the natural order of the universe” [alteration in original].)

<sup>102</sup> *Marshall; Bernard*, *supra* note 5 at para 25.

<sup>103</sup> *Ibid*.

fish are caught for food or for sale.”<sup>104</sup> Again, though, the Court’s atomistic approach allows the separation of the activity of fishing from its role in providing subsistence as illustrated in Justice Bastarache’s assertion that only “traditional *means*” can be protected or that fishing “was a significant and defining feature of the Sto:lo culture”<sup>105</sup> while restricting the uses of the caught fish. But again, such a holding in *Van der Peet* and, therefore, *Sappier* is a product, contrary to *Sparrow*, of enfolded governmental regulations into the intersocietal definition of an Aboriginal right. Such an enfoldment contradicts Chief Justice Lamer’s holding that Aboriginal rights are founded on pre-contact practices, customs or traditions as the belief that Aboriginal peoples in the Pacific Coast region fished simply for subsistence purposes was, again, created by the aforementioned 1888 fisheries amendment and ignores the only perspective that truly can

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<sup>104</sup> Douglas C Harris & Peter Millerd, “Food Fish, Commercial Fish, and Fish to Support a Moderate Livelihood: Characterizing Aboriginal and Treaty Rights to Canadian Fisheries” (2010) 1 Arctic Review on Law & Politics 82 at 99. Following *Gladstone*, it may be argued that commercial rights, unlike for food, social and ceremonial purposes, have no internal limitations. See e.g. *Gladstone*, *supra* note 11 at para 57. Lamer CJ contrasts the legal and factual context in *Gladstone* with that in *Sparrow* over this internal limitation issue arguing that in the former, the only limitation would be for conservation, resulting in giving an Aboriginal “right-holder exclusivity over any person not having an aboriginal right” due to the order of priority outlined in the latter. *Ibid* at paras 57-63. Yet given the food fisheries restrictions that render the *Sparrow* “priority doctrine” specious, the result is Aboriginal peoples bear the vast majority of the burden for conservation—as even federal Pacific fisheries reports have acknowledged. See e.g. Peter H Pearce, *Turning the Tide: A New Policy for Canada’s Pacific Fisheries*, The Commission on Pacific Fisheries Policy Final Report (Vancouver: Minister of Supply and Services, Canada, 1982) at 177, 181 [Pearce, *Turning the Tide*], *Managing Salmon*, *supra* note 55 at 6, 11. See also Sharma, *supra* note 55 at 31, 38, 53. Moreover, between 1988 and 1992, Aboriginal fishers caught, on average, only 3.4% of all species of salmon in British Columbia (compared with 93.2 and 3.4% for commercial and sport interests respectively), Lamer’s straw man of exclusive and unrestricted access to salmon also implies the debunked “tragedy of the commons” argument (see e.g. Newell, *Tangled Webs*, *supra* note 93 at 26) and ignores any potential contributions the Aboriginal perspectives and laws may have for fisheries management, perpetuating colonial power asymmetries, and implies and perpetuates the image of Aboriginal peoples as rapacious and capricious. See e.g. André Goldenberg, “‘Surely Uncontroversial’: The Problems and Politics of Environmental Conservation as a Justification for the Infringement of Aboriginal Rights in Canada” (2002) 1 JL & Equality 278 at 311-17 [Goldenberg, “Surely Uncontroversial”]; Hanson & Hanson, *supra* note 58 at 437; Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) at 81-82, 84; Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Baltimore: Johns Hopkins Press, 1967) at 68; Sharma, *supra* note 55 at 30. Hugh Brody has also suggested that stereotypes of Indigenous peoples as “cavemen” “is a projection of the modern onto the ancient.” Hugh Brody, *The Other Side of Eden: Hunter-Gathers, Farmers and the Shaping of the World* (London: Faber and Faber, 2001) at 262-63. These images and stereotypes of Aboriginal peoples reflect Thomas Hobbes’ description of people in his “state of nature.” See e.g. *Leviathan* (New York: Penguin Books, 1968) at 185-87; Jennifer Sepez Aradanas & Ann Tweedie, “Makah Harpoons vs. Media Hype: Cultural Stereotypes, Academic Research, and Public Policy” (1999) Fall Oregon Humanities 48 at 51.

<sup>105</sup> *Van der Peet* (SCC), *supra* note 1 at para 86.



provide insights into the “pre-contact” once more: the Aboriginal one.<sup>106</sup> *R. v. Adams*,<sup>107</sup> *R. v. Côté*<sup>108</sup> and *Powley* all ruled in favour of an Aboriginal right to fish or hunt for food, the difference between these cases and British Columbia fishing ones (or even with *Sappier*) is the lack of interveners representing commercial and “sport” interests—the same interests that lobbied for, and continue to lobby for, the restriction of Aboriginal fisheries and rights<sup>109</sup> yet have no constitutional support/foundation for them having any involvement in Aboriginal issues.<sup>110</sup>

Thus, if the activity of fishing (that is sometimes, as alluded to, characterized as a practice, sometimes as a custom) is a distinctive, integral activity and the doctrine of discontinuous or logical evolution states that it can be “carried on *in the modern economy* by modern means,”<sup>111</sup> the holding in many cases that such an activity *cannot* “evolve” into a commercial right means that the doctrine of evolution is contradicted. This judicial interpretation appears to be an unnecessary and unsupported limitation, or it freezes the right at contact. Subsistence fishing—particularly in how the Court (and the Crown) conceives it—is not a “modern” means of the modern economy. (Moreover, Chief Justice Lamer’s testing of the

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<sup>106</sup> See e.g. Newell, *Tangled Webs*, *supra* note 93 at 24, 62. Again see also *Sparrow*, *supra* note 2 at 1092-93 for a discussion of how and why incorporating the regulation of an Aboriginal right into its definition is problematic.

<sup>107</sup> [1996] 3 SCR 101 [*Adams*].

<sup>108</sup> [1996] 3 SCR 139 [*Côté*].

<sup>109</sup> Harris, *Landing Native Fisheries*, *supra* note 58; Sharma, *supra* note 55. See also the input/influence commercial and sport fisheries interests had in government reports on Pacific fisheries. See e.g. Pearse, *Turning the Tide*, *supra* note 104, *Managing Salmon*, *supra* note 55.

<sup>110</sup> One may argue that such non-Aboriginal organizations should have an involvement in Aboriginal fishing rights due to their role and interests in management and “conservation,” but neither of these aspects of the Pacific fisheries has anything to do with an actual Aboriginal right and its existence. Regardless of Chief Justice Lamer’s ignoring of *Sparrow* while defining Aboriginal fishing rights through the lens of governmental regulations, he suggests that he still subscribes to the *Sparrow* framework. See e.g. *Van der Peet* (SCC), *supra* note 1 at para 92. Thus, according to Lamer’s development of the doctrine of Aboriginal rights, governmental regulations become a “one-two punch”: they somehow help define a pre-contact Aboriginal right (without justifying why/how), that if found to exist can then also justifiably infringe the right it helped define.

<sup>111</sup> *Marshall; Bernard*, *supra* note 5 at para 25 [emphasis added].

exchange of fish for money or, in particular, other goods for its integrality again reveals the Court's poor understanding of the distinctive and integral potlatch complex.)

Perhaps the Court, following the “link between the notion of commerce and the introduction of European culture,”<sup>112</sup> would contend, ignoring the atomism of the argument, that the sale of fish was a product of European influence.<sup>113</sup> Again this contradicts the intersocietal nature of Aboriginal rights. And as Justice McLachlin's dissent in *Van der Peet* highlights,<sup>114</sup> this supposed “link” depends on the definition of “commerce” that is used.

To illustrate some of the problems, contradictions and barriers the Court's approach to commercial Aboriginal rights and the doctrine of discontinuous or logical evolution create, let us focus on the *Lax Kw'alaams* BCSC ruling. Similar to *Van der Peet*, *Lax Kw'alaams* involved, in part, a claim to an Aboriginal commercial fishing right. Satanove J. rejected the claim based on her not being persuaded that the pre-contact Coast Tsimshian practices, customs and traditions supported such an Aboriginal right.<sup>115</sup> Both of the appeals made by the *Lax Kw'alaams* to the British Columbia Court of Appeal and the SCC centred, partly, around how their right was judicially characterized (again highlighting the disempowering of Aboriginal peoples) and on the judicial assessment of the relevant practices, customs and traditions in relation to their objectified

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<sup>112</sup> *Gladstone*, *supra* note 11 at para 28. This fetishistic attitude of the courts is based on the belief that the system of private law constructed in the eighteenth- and nineteenth-century Europe discovered the “natural” legal structure of market society. This is in contrast to how contemporary courts have begun to see the market—in a more realistic sense—as an ongoing compromise that is unstable and movable in each of its parts. The judicial refusal to use the existing private laws rules and arrangements as a “neutral” baseline by which to judge the legitimacy of governmental regulation and redistribution has a lengthy history. The contemporary concept of the market awakens us to an appreciation of the differing legal-institutional forms that market economies may take both now and in the past. The contemporary conception of a market economy is indeterminate—that is to say that it is capable of being realized in different forms and legal directions. See also text accompanying note 128 for a similar discussion.

<sup>113</sup> See e.g. *Van der Peet* (SCC), *supra* note 1 at para 89.

<sup>114</sup> *Ibid* at paras 236-37.

<sup>115</sup> *Lax Kw'alaams* (BCSC), *supra* note 16 at paras 501-03, *aff'd* *Lax Kw'alaams* (BCCA), *supra* note 16, *aff'd* *Lax Kw'alaams* (SCC), *supra* note 16. *Lax Kw'alaams* (BCSC) is another instance of the Court allowing non-Aboriginal interveners. Interestingly, the conservation group intervener had the same representation as the commercial interveners!

and atomized culture.<sup>116</sup> In this characterization and assessment the internal perspectives of the Aboriginal peoples involved was not considered pertinent or of import. Significant in Satanove's original decision was determining what "kind" of economy pre-contact Coast Tsimshian had framed through the Court's categorical thought in which exchange becomes formulated through (Eurocentric) oppositions: market economy or kinship economy,<sup>117</sup> gift exchange or commercial exchange,<sup>118</sup> and so on. As a result, Satanove found that the pre-contact Coast Tsimshian had only a form of kinship economy—"as that term is used by the anthropologists"—and so could not be called a European market economy.<sup>119</sup> This dualistic approach to the categories of exchange serves to highlight, yet again, how the logic of inversion erects a boundary between elements of the Court's taxonomies, isolating, essentializing, reifying and freezing them. There are a number of problems with this approach generally, as I have been discussing, that Satanove's position illustrates in the contexts of claims to commercial rights.

First is that taxonomies of exchange systems, which Satanove J. essentializes into "economies" and then takes the specific type of system as integral to the "distinctive society,"<sup>120</sup> is evolutionary. Therefore, by finding that the Lax Kw'alaams' ancestors only had a kinship economy, regardless of its validity, precludes any form of market exchange based on the traits of each category. Possibly due to these associated traits, Satanove appears to also conflate "market" with "commercial," irrespective of the defendant's seeming acknowledgement that it was possible to have market exchange prior to "European influence."<sup>121</sup> This conflation of categories and their traits, though, is significant as Satanove reifies the Stewardian evolutionary influences

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<sup>116</sup> See e.g. *Lax Kw'alaams* (BCCA), *supra* note 16 at para 5; *Lax Kw'alaams* (SCC), *supra* note 16 at para 2.

<sup>117</sup> See e.g. *Lax Kw'alaams* (BCSC), *supra* note 16 at para 284.

<sup>118</sup> See e.g. *ibid* at para 301.

<sup>119</sup> *Ibid* at paras 289, 315.

<sup>120</sup> *Ibid* at paras 283-84.

<sup>121</sup> See e.g. *ibid* at paras 274, 294.

in *Van der Peet*, by stating that the “issue of whether tribes existed pre-contact is important because it may have a bearing on: ... the extent to which the pre-contact aboriginal society was organized.”<sup>122</sup> Similar to *Van der Peet* then, traits become exclusively associated with particular categories arranged hierarchically based on supposed “level of organization.” Again we find another instance of the power asymmetry where Aboriginal claims must be determined on a “case-by-case” basis that is overlaid by and determined through a universalized hierarchical taxonomy of classifications. *All* of the associations Lamer C.J. makes in paragraph 90 of *Van der Peet* are based solely on the universal taxonomy he speculatively applies to the evidence. And because those taxonomies are naturalized, the distinctive Aboriginal perspectives and traditions etc. are once more marginalized, and Aboriginal lives are disjoined, reified and rigidified.

Furthermore, Satanove J. also conflates “market economy” with “capitalist society,” thereby reinforcing Eurocentric exchange with “commerce,” defining the idea of “market” in purely Eurocentric terms as including “some form of supply and demand,” market places, and markets.<sup>123</sup> She further specifies the “market” aspect of the idea of “market” as being “fully integrated economic forms where transactions are made through money, and prices are a function of supply and demand.”<sup>124</sup> Such a definition surely makes determinations of commercial Aboriginal rights quite simple: if there was no money—understood as the exemplar of a standard unit of exchange<sup>125</sup>—there is no market, and, therefore, no pre-contact commercial exchange.<sup>126</sup> This approach, though, ignores the distinctiveness of the practices, customs, traditions and laws involved in trade and exchange among Aboriginal peoples. As I have pointed out: the Court itself

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<sup>122</sup> *Ibid* at para 140.

<sup>123</sup> *Ibid* at paras 285-86.

<sup>124</sup> *Ibid* at para 286.

<sup>125</sup> See e.g. *ibid* at paras 323-39.

<sup>126</sup> And note that Satanove explicitly identifies money as the medium of exchange which further limits what forms of transactions qualify as “market.”

has stated that these activities and laws do not have to be similar to the European correlates in origin or practices.

Satanove J. goes on to further evince categorical thought by stating that *all* foraging peoples do not have market places, thereby adding yet another impenetrable barrier to commercial intersocietal Aboriginal rights: “Distribution and sharing amongst the foraging community is not a marketplace because the notion of a marketplace involves populations from *discrete communities* coming together at a place to exchange goods.”<sup>127</sup> With such a belief, one wonders how any contemporary foraging peoples (or contemporary peoples whose pre-contact ancestors were foragers) are able to participate at all in the “modern” economy! Such wonderment, though, yet again highlights the Court’s discriminatory static conception and approach to culture and how the naturalization of their categorical thought biases their understanding of foraging peoples:

The hunter-gatherer literature shows that “economic rationality” is peculiar to market capitalism and is an embedded set of cultural beliefs, not an objective universal law of nature. There are many other, equally rational, ways of behaving which do not conform to the laws of market exchange. The myth of economic man explains the organizing principle of contemporary capitalism, nothing more or less.<sup>128</sup>

Moreover, even the source Dr. Lovisek, the (only) expert witness for the defendants, cites in support of her assertion that the Lax Kw’alaams had a kinship economy mentioned by Satanove states that “the ethnographic record shows that *all* societies have some exchange relationships with other groups” and that the marketplace is only one way of organizing exchange.<sup>129</sup> Yet that the traits of “modern” (Eurocentric) capitalism form the background of the Court’s approach to

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<sup>127</sup> *Ibid* at para 288 [emphasis added]. Note also the contrast between the “foraging community” and the “discrete communities” of market exchange.

<sup>128</sup> John Gowdy, “Hunter-gatherers and the mythology of the market” in Richard B Lee & Richard Daly, eds, *The Cambridge Encyclopedia of Hunters and Gatherers* (Cambridge: Cambridge University Press, 1999) 391 at 394.

<sup>129</sup> Susana Narotzky, *New Directions in Economic Anthropology* (Chicago: Pluto Press, 1997) at 53-54 [emphasis added], cited in *Lax Kw’alaams* (BCSC), *supra* note 16 at para 295.

exchange is perhaps most apparent in the final nail in the Lax Kw'alaams' commercial claim when Satanove concludes that their pre-contact economy cannot be described as "market" based on all of the expert witnesses agreeing "that the pre-contact Coast Tsimshian economy was not a *western style capitalist one*."<sup>130</sup> Eurocentrism abounds! But what of the intersocietal bridge that requires the interweaving of the Aboriginal perspective to establish an Aboriginal right?

In *Ahousaht Indian Band v. Canada (AG)*<sup>131</sup> we find possibly one of the few examples of the Aboriginal perspective actually being taken into account—to a certain extent. Justice Garson acknowledged that the plaintiffs did not agree with the Crown's expert witness's (Lovisek again) definition of "commercial trade" (partly because it again denied any role to kin relationships), as they contended that, among other things, the Nuu-chah-nulth conception of kinship is much broader than the Eurocentric category.<sup>132</sup> Garson accepted this argument, rejected the Crown's definition, and concluded:

[Lovisek's] definition of "commercial trade" exposes a definitional problem that is central to the issues I must decide. In my view, because kinship has such a broad meaning in the Nuu-chah-nulth culture, it is not necessarily appropriate to exclude trade between neighbouring tribes from the definition of trade or commercial trade on the basis that these tribes are kin.<sup>133</sup>

By rejecting Lovisek's (and the Crown's) narrow definition of kinship, and therefore of "kinship economy," Garson was able to adopt a more flexible approach to the category of "trade" and went on to rule that pre-contact Nuu-chah-nulth fishing and trade in fish "gradually evolved into modern commercial fishing either for wages or for sale. ... I am satisfied that there is sufficient continuity of commercial fishing and activities during this period for purposes of establishing the

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<sup>130</sup> *Ibid* at para 289 [emphasis added].

<sup>131</sup> [2010] 1 CNLR 1 [*Ahousaht*].

<sup>132</sup> *Ibid* at para 211.

<sup>133</sup> *Ibid* at para 218.

plaintiffs' aboriginal rights.”<sup>134</sup> However, highlighting the multiplicity of definitions of “commercial” used by various courts,<sup>135</sup> Garson was not prepared to grant a right to sell fish on a “large industrial scale ... given my finding that trade was not for the purpose of accumulating wealth.”<sup>136</sup> Somehow, then, for Garson distinctive Nuu-chah-nulth activities of fishing and trade in fish evolved into a “commercial” form, but not “commercial” enough to make money or create wealth.<sup>137</sup>

Yet if the “modern” Canadian economy is commercial and the goal of commerce is the accumulation of wealth, what does the “carried on in the modern economy” part of the doctrine of logical evolution mean in the contexts of Aboriginal rights “for food”? The idea that Aboriginal peoples did not accumulate wealth ignores the purpose and conception of wealth in the potlatch complex. It also not only harkens back to traits associated with the “band” level of social organization,<sup>138</sup> but is also a static approach to Aboriginal peoples and their lives. Thus, while the notion of accumulating wealth can be attributed to Justice McLachlin’s reasons in

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<sup>134</sup> *Ibid* at para 434. In the next paragraph of the ruling, Garson even recognized, unlike what we have seen above, the impact of colonialism: “In any event, Canada cannot argue that the plaintiffs were not exercising their aboriginal practices of fishing and trading in fish when fisheries regulations made it illegal for them to do so except with a licence.” *Ibid* at para 435.

<sup>135</sup> I will return to this in what follows, but as some examples solely from the SCC: “The sale of in excess of 119,000 pounds of salmon by 80 people, an amount constituting approximately 1,500 pounds of salmon per person, would appear to be much closer to an act of commerce—‘exchange of merchandise or services, esp. on a large scale’ (emphasis added), *Concise Oxford Dictionary* (7th ed. 1982).” *R v NTC Smokehouse*, [1996] 2 SCR 672 at para 18 [*NTC Smokehouse*]. (Note, yet again, how the Court uses a contemporary activity to characterize or define an Aboriginal right that is supposed to arise from pre-contact practices, customs and traditions.) “When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains.” *Van der Peet* (SCC), *supra* note 1 at para 236. “[T]he extent and scope of the trading activities of the Heiltsuk support the claim that ... the Heiltsuk have demonstrated an aboriginal right to sell herring spawn on kelp to an extent best described as commercial. The evidence of Dr. Lane, and the diary of Dr. Tolmie, point to trade of herring spawn on kelp in ‘tons.’” *Gladstone*, *supra* note 11 at para 28. “Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle.” *Ibid* at para 165. Following this opinion of McLachlin J in *Gladstone*, Binnie J held in *Marshall* that “equally, it is not suggested that Mi’kmaq trade historically generated ‘wealth which would exceed a sustenance lifestyle.’” *Marshall*, *supra* note 51 at para 60.

<sup>136</sup> *Ahousaht*, *supra* note 131 at para 486. In this paragraph Garson combines the two typical uses of “commercial” by the Court (see note 135): as “sale on a large industrial scale” and for accumulating wealth.

<sup>137</sup> Note, also, that Garson implicitly defines wealth in monetary terms—ignoring the internal Aboriginal perspectives as to what may constitute “wealth.”

<sup>138</sup> See discussion in chapter 2.

*Gladstone*<sup>139</sup> and *Van der Peet*,<sup>140</sup> it is also possible to link it to Chief Justice Lamer's point about the inherent limitation created by Aboriginal title:

For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).<sup>141</sup>

Granted, while Lamer is attempting to maintain a connection between the uses of land and the foundation of the test for Aboriginal title (or rights),<sup>142</sup> there is a certain level of romanticism and fixity in the Court's approach that also serves to further limit contemporary rights.<sup>143</sup>

As part of Chief Justice Lamer's characterization of Aboriginal title, he restricted it based on a contrast with, in particular, fee simple title<sup>144</sup> and then went on from there to set the limit of such title at "unacceptable" uses (as seen above).<sup>145</sup> While Lamer does not outright dismiss commercial uses of land (qua "unacceptable" uses), he states that the Aboriginal people "must surrender those lands and convert them into non-title lands to do so."<sup>146</sup> Once more we see the common law reinvented as integral to Aboriginal law and how if Aboriginal peoples wish to participate in contemporary Canadian society, and thereby supposedly lose their

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<sup>139</sup> *Supra* note 11 at paras 164-65.

<sup>140</sup> *Supra* note 1 at para 311.

<sup>141</sup> *Delgamuukw* (SCC), *supra* note 71 at para 128. Goldenberg suggests that this position adopted by Lamer CJ was the "absurd extreme" in the "trend of discomfort or even hostility towards commercial Aboriginal rights." "Salmon", *supra* note 52 at 93.

<sup>142</sup> Though in doing so, Lamer seems to imply, similar to the discussion in note 104, Aboriginal peoples have no laws or self-control that would prevent such "destruction." See e.g. Goldenberg, "Surely Uncontroversial", *supra* note 104 at 288-89.

<sup>143</sup> Not that I am suggesting anything remotely approaching a Hobbesian pre-contact period like McEachern CJ did in *Delgamuukw*. *Delgamuukw* (BCSC), *supra* note 37 at 11. See e.g. Goldenberg "Salmon", *supra* note 52 at 99, 110. For a discussion of stereotypes like the "Ecological Indian" and their implications that often underpin contemporary discussions, particularly by non-Aboriginal peoples, of the relationship between Indigenous peoples and the "environment" see e.g. Sepez Aradanas & Tweedie, *supra* note 104; Paul Nadasdy, "Transcending the Debate over the Ecologically Noble Indian: Indigenous Peoples and Environmentalism" (2005) 52 *Ethnohistory* 291.

<sup>144</sup> See e.g. *Delgamuukw* (SCC), *supra* note 71 at para 125.

<sup>145</sup> See e.g. Goldenberg, "Salmon", *supra* note 52 at 93.

<sup>146</sup> *Delgamuukw* (SCC), *supra* note 71 at para 131.



“distinctiveness”/“distance,” they must surrender their constitutionally entrenched rights. Nowhere in Lamer’s intersocietal doctrine of Aboriginal rights does it have anything about this surrendering though. And given that “intersocietal,” as the Court has acknowledged, involves the *bridging* of Aboriginal and non-Aboriginal “cultures” and evolved from “long-standing practices” that link the two, should not a similar approach be applied to the interpretation of the distinctive practices, customs and traditions of exchange and trade of Aboriginal peoples as to the Euro-Canadian practices, customs and traditions of trade, commerce or commercial rights? If early European fur traders and Aboriginal peoples could work out a system to bridge the supposedly (according to the Court) completely foreign practices, customs and traditions of trade and exchange while overcoming cultural and linguistic differences,<sup>147</sup> surely that intersocietal system could “evolve”—or be (logically) evolved—into a contemporary system for Aboriginal rights.

Lamer C.J. appears to realize that his “acceptable” uses approach may result in freezing contemporary Aboriginal cultures and lives in the past, as he writes in the next paragraph, “This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it.”<sup>148</sup> But what does he mean then by the limitation that the relationship Aboriginal title was established on cannot be “destroyed”? It is here, in particular, that the romanticism in aspects of the Court’s approach becomes apparent, as the “Noble Savage”/“Ecological Indian” imagery pervades the criteria for acceptability.<sup>149</sup> First is the juxtaposition of the “traditional” and the “modern,” with “commercial,” reflecting its supposed Eurocentric origins and Eurocentric tunnel history, being associated with “modernity.” Commercial Aboriginal rights are an oxymoron in this logic, as we have seen somewhat above,

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<sup>147</sup> See e.g. Keith Thor Carlson, “Stó:lō Exchange Dynamics” (1996) 11:1 Native Studies Review 5.

<sup>148</sup> *Delgamuukw* (SCC), *supra* note 71 at para 132.

<sup>149</sup> With regards to the various forms of this imagery see notes 104 and 143 and accompanying text.

but also “because such rights would be inconsistent with Aboriginal environmental philosophies, even where mainstream interpretations of such philosophies are rooted in the hegemonic perceptions of Aboriginal culture.”<sup>150</sup> Aboriginal rights to harvest resources, then, are restricted to subsistence or sustenance lifestyles based on Eurocentric stereotypes that can only involve what the Court deems (authenticates) as “traditional” practices, precluding commercial purposes and the accumulation of wealth (and even the potential for their evolution).<sup>151</sup>

Furthermore, with the Court quite explicitly and unreflexively associating “commercial” with “market” and therefore to Eurocentric categories, this suggests it is extremely difficult to prove an intersocietal Aboriginal commercial right. Some Aboriginal peoples have had some limited success in getting such rights, but only by proving “cognizability” to the categories used by the Court.<sup>152</sup>

The Court, though, seems hesitant to grant commercial Aboriginal rights and claims to such rights provide another instance of a case-by-case lottery depending on how the particular court defines “commercial”: outside of the market and standardized currency criteria, the Court has also used scale and intensity of trade.<sup>153</sup> So, for example, Lamer C.J. contrasted the circumstances in *R. v. N.T.C. Smokehouse* with those in *Van der Peet* and concluded that the Sheshaht and Opetchesaht appear to have a claim closer to a commercial fishing right than Mrs.

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<sup>150</sup> Goldenberg, “Surely Uncontroversial”, *supra* note 104 at 292.

<sup>151</sup> See e.g. *ibid.*

<sup>152</sup> For example, see note 135 and the various criteria and definitions used by the courts in Aboriginal rights rulings. Further, as we have seen a bit already, in *Gladstone*, an instance of a successful claim to a commercial Aboriginal right, the trade in herring spawn on kelp was found to be a central and defining feature of Heiltsuk society because, and in contrast to *Van der Peet* and *NTC Smokehouse*, of primarily the volume of herring spawn on kelp the Heiltsuk traded. See e.g. *Gladstone*, *supra* note 11 at paras 28-29. A further difference between the *Gladstone* and, in particular, *Van der Peet* rulings is that in the former there was no discussion (or it was not held as pertinent) of levels of social organization and kinship as part of determining the centrality and integrality of the activities the claim was founded on.

<sup>153</sup> See e.g. note 135.

Van der Peet because the *volume* involved accorded much better with the dictionary definition of “commerce” Lamer used that clearly restricts commerce to large scale exchange.<sup>154</sup>

Again because of the naturalization of dictionary definitions, the connection between the categories of commerce and Eurocentric thought becomes consigned and hidden in the background, unacknowledged and unquestioned. Thus, Chief Justice Lamer’s definition of “commerce” was quoted *twice* in *Ahousah*<sup>155</sup> which Garson J. then used to reject characterizing the claimed Aboriginal right as “large industrial scale” as discussed above.<sup>156</sup> This all makes one wonder what happened to Lamer’s oft quoted admonishment that “Aboriginal rights cannot ... be defined on the basis of the philosophical precepts of the liberal enlightenment” or what those precepts exactly are.<sup>157</sup> As clearly determinations of commercial Aboriginal rights are saturated with at least the categories (and, depending on how Lamer formulated them, precepts) of modernism and Eurocentrism.<sup>158</sup>

When “commerce” is characterized as exchange on a large scale, determining whether a commercial right has been shown then becomes a process of defining what “large scale” means. One result of this is that “trade” becomes inverted from a process, relationship or interaction into a countable unit based on volume and intensity. In other words, once more “culture” becomes fragmented into an inventory of countable traits or characteristics, divorced from the lives of Aboriginal claimants, and relegated to a world of “facts” that awaits “discovery” by the neutral observer. For example, because of the opposition of kinship and market economies in the Court’s thought, “commercial exchange” has been held as existing *only* when “there is no kinship

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<sup>154</sup> *NTC Smokehouse*, *supra* note 135 at para 18.

<sup>155</sup> *Supra* note 131 at paras 462, 484.

<sup>156</sup> See text accompanying notes 131-136.

<sup>157</sup> *Van der Peet* (SCC), *supra* note 1 at para 19 [underlining in original].

<sup>158</sup> For example, Harris and Millerd argue that the reserve and the food fishery are *legal categories* that were used to marginalize the presence of Aboriginal peoples on the land and in the fisheries; and concluded that the result of the fishing “for food” characterization “is part of a colonial history of dispossession.” *Supra* note 104 at 99. See also Harris, *Landing Native Fisheries*, *supra* note 58 at 4.

relationship between the partners in the transactions, except for purely economic reasons.”<sup>159</sup>

The Court, then, only needs to look in this context for evidence (“facts”) of the existence of the traits associated with the “market” or whether exchange partners are related. Yet such a definition of commercial exchange would result in the paradoxical conclusion, if it was ever to be applied beyond the context of Aboriginal rights, that two (Euro-Canadian) relatives who own separate businesses but sell things to each other would not be participating in “commercial exchanges”! The Court is able to avoid this conclusion though, through the various Eurocentric definitions of “commercial” thereby perpetuating the colonial power asymmetries and double standards: as surely the two Euro-Canadians would be considered to be engaging in commercial exchange, so what, then, is the difference with claims to commercial Aboriginal rights?

I argue further that the kinship versus market economies binary relied on by the courts is based not only on the “idiom of kinship,”<sup>160</sup> but on population size as well.<sup>161</sup> The number of individuals in a group was one of the factors that drove, as they procreate, cultural evolution. According to these evolutionary schemes, when population size increases enough to allow a society to have full time specialists and increased production, markets, money, and so on develop.<sup>162</sup> “Markets,” in these evolutionary theories then, are said to be “universally absent”

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<sup>159</sup> *Lax Kw’alaams* (BCSC), *supra* note 16 at para 295. This judicial approach appears to ignore the fact that in contemporary economies most wealth is inherited along lines of kinship. The rules governing the *inter vivos* and hereditary transmission of wealth enable certain people to inherit differentially from their parents instead of more equally from society. See e.g. Roberto M Unger, *Democracy Realized: The Progressive Alternative* (London: Verso, 1998) at 204-06; Stephen Haseler, *The Super-Rich: The Unjust New World of Global Capitalism* (New York: Palgrave Macmillan, 2000) at 72-4; Kevin P Phillips, *Wealth and Democracy: A Political History of the American Rich* (New York: Broadway Books, 2003).

<sup>160</sup> *Van der Peet* (SCC), *supra* note 1 at para 84. This concept embodies the most pervasive theme in Eurocentric economic analysis: the idea of the market as a form of cooperation among strangers who are neither friends nor enemies and who need only the cold calculus of supply and demand to establish a common practical bond.

<sup>161</sup> Similarly, population size is used in arguments against Aboriginal title. While *Marshall*; *Bernard* did establish that nomadic peoples (typified in the Court and in the anthropological literature as having small populations) *could* establish title (*supra* note 5 at para 70), the argument and deliberations of it persist. See e.g. *Tsilhqot’in*, *supra* note 76 at paras 922-23.

<sup>162</sup> See e.g. Leslie White, “Energy and the Evolution of Culture” (1943) 45 *American Anthropologist* 335 at 343; Robert L Carneiro, “On the Relationship Between Size of Population and Complexity of Social Organization”

from Indigenous societies.<sup>163</sup> This evolutionary perspective is founded on the same theory/-ist as the Court relied on in *Lax Kw'alaams* though—Karl Polyani.<sup>164</sup> Moreover, Satanove J. discusses “organized society” and levels thereof<sup>165</sup> that parallels, almost word-for-word, the evolutionary taxonomies created by the anthropologists discussed in chapter 2. Thus, Satanove implicitly maintains the anthropological evolutionists’ taxonomy that held that “primitive” and “civilized” represent the two “great stages” of culture, in which the latter is integrated via “the state” while the former is organized by kinship.<sup>166</sup> This again reflects the Eurocentric conceit, as being the most fully rational, complex and superior, in comparison, to the “simple” “non-moderns”:

Dr. Langdon explains in his report that in simple economies, objects are traded without standard rates or medium of exchange. In more elaborate economies, both standard rates and mediums of exchange may occur, but multiple items may be involved in the exchange, and there is no single item such as money that can unify valuation and exchange. Highly complex economies are integrated to an extremely high degree by markets, and money makes possible the exchange of objects necessary. ... True market integration was not present in the traditional, pre-contact Coast Tsimshian economy.<sup>167</sup>

“Traditional” (Aboriginal) cultures and societies once more become the “Other” through the second Great Divide that contrasts “Us” and “Them” based on ethnocentric categories and criteria, and so “They” are deemed “simple” and “primitive” because their “political and economic spheres of life are still embedded in their kinship system”<sup>168</sup>—without ever actually looking at the peoples in question, as well as their perspective.

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(1967) 23 *Southwestern Journal of Anthropology* 234 at 242; Lewis Henry Morgan, *Ancient Society* (Chicago: Charles H Kerr & Company, 1877) at 40-41.

<sup>163</sup> See e.g. Marshall Sahlins, *Stone Age Economics* (Chicago: Aldine-Atherton, 1972) at 301.

<sup>164</sup> See e.g. *Lax Kw'alaams* (BCSC), *supra* note 16 at paras 282-84; Michael Goldsmith, “Marshall Sahlins (1930–)” in Robert Gordon, Andrew P Lyons & Harriet D Lyons, eds, *Fifty Key Anthropologists* (London: Routledge, 2011) 209 at 209-10.

<sup>165</sup> *Lax Kw'alaams* (BCSC), *supra* note 16 at paras 125ff.

<sup>166</sup> See e.g. *ibid* at paras 288, 290-315; Marshall D Sahlins & Elman R Service, *Evolution and Culture* (Ann Arbor: University of Michigan Press, 1960) at 36.

<sup>167</sup> *Lax Kw'alaams* (BCSC), *supra* note 16 at paras 323-24.

<sup>168</sup> Nigel Rapport & Joanna Overing, *Social and Cultural Anthropology: The Key Concepts*, 2d ed (London: Routledge, 2007) at 116, 378-79.

Yet while the Eurocentric dominion over the “market” and its associated traits and confluences (i.e., with capitalism) become entrenched prejudices and biases, they are not the only barriers Aboriginal claimants face in attempting to assert commercial rights. The Court also applies the “simplistic” stereotype, as mentioned in the last chapter, to the distinctive technologies and “cultures” of pre-contact Aboriginal peoples.<sup>169</sup> Thus, in limiting the Nuuchah-nulth right to trade fish, Garson J. stated, “Those quantities, nevertheless, were limited by the methods of fishing employed by the ancestral communities.”<sup>170</sup> But this assertion once more highlights the conceit and double standards of Eurocentric tunnel history. First, ignoring the ambiguity over what is meant by “contact”<sup>171</sup> and how the SCC held in both *Van der Peet*<sup>172</sup> and *Gladstone*<sup>173</sup> (and confirmed in *Sappier*<sup>174</sup>) that the arrival of Europeans commenced “European influence” throughout North America, most Aboriginal rights cases in coastal British Columbia use 1793 as “contact.”<sup>175</sup>

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<sup>169</sup> This association has long been popular in Eurocentric thought generally. See e.g. *ibid* at 116.

<sup>170</sup> *Ahousaht*, *supra* note 131 at para 485. Though uncited, this line of reasoning is similar to Justice McLachlin’s in her dissenting opinion in *Van der Peet*:

The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained from the portion of the river or sea. ... There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource.

*Van der Peet* (SCC), *supra* note 1 at paras 278-79.

<sup>171</sup> See e.g. *Lax Kw’alaams* (BCSC), *supra* note 16 at para 113.

<sup>172</sup> *Van der Peet* (SCC), *supra* note 1 at para 61.

<sup>173</sup> *Supra* note 11 at para 53.

<sup>174</sup> See e.g. *supra* note 41 at para 49.

<sup>175</sup> See e.g. *Lax Kw’alaams* (BCSC), *supra* note 16 at para 118. Garson determined 1774 to be the date of contact in *Ahousaht* even though she acknowledged that the “first contact that involved any significant interaction” was in 1778. *Supra* note 131 at paras 94-95. Further highlighting the problems with the idea of “contact,” and illustrating the impetus for why I proposed the notion of “cultural pragmatics,” Garson also found that while she used 1774 as “contact,” “that date does not precisely demarcate between pre-contact Nuuchah-nulth activity on the one hand and activity influenced by European contact on the other.” *Ibid* at para 95. Taking the earlier date, regardless of how much “contact” has occurred, is also found in *Tsilhqot’in*: while Vickers J stated that “actual first contact” between Europeans and Tsilhqot’in peoples did not occur until 1808, he felt, in justifying his fixing the date of contact at 1793, that nothing “turns on the passage of time between 1793 and 1808” and so choosing one of these two years for the “actual date of contact ... is of no consequence.” *Tsilhqot’in*, *supra* note 76 at para 1211. All of this is in opposition to the criteria used in *Adams*: the “establishment of effective control.” *Supra* note 107 at para 46.

Yet if we take 1793 as representing the date of “contact” for establishing an Aboriginal right to fishing and to thereby limit methods of fishing, this then freezes “culture” and denies the lives of coastal British Columbian Aboriginal peoples. Setting aside the centrality of Aboriginal peoples in the development of the British Columbia commercial fishing industry,<sup>176</sup> the lack of “demand” Satanove J. used to deny the commercial claim in *Lax Kw’alaams* was a result of European inabilities to preserve salmon for lengthy periods<sup>177</sup> and to find markets for the salmon—not Aboriginal peoples’ ability to harvest fish.<sup>178</sup> It was not until the development of canning technology—a technique that was not perfected (in France) until the first decade of the

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<sup>176</sup> See e.g. Pearse, *Turning the Tide*, *supra* note 104 at 151; Newell, *Tangled Webs*, *supra* note 93 at 46-47; John Sutton Lutz, *Makúk: A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008) at 92-93, 186; Douglas C Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) at 9 [Harris, *Fish, Law, and Colonialism*].

<sup>177</sup> The early issues with preserving salmon by the HBC is ironic given Chief Justice Lamer’s confirmation of Provincial Court Judge Scarlett’s finding of a lack of means for preserving fish as suggestive that trade was not central to the Stó:lō (*Van der Peet* (SCC), *supra* note 1 at para 90) and given that the introduction of canning solved the problems of exporting salmon that had been preserved with salt. See e.g. Mackie, *supra* note 70 at 200, 224-25. Lamer’s (and Scarlett’s) finding is even contradicted in *Van der Peet* by Justice L’Heureux-Dubé’s dissenting opinion! At paras 216-17 she writes:

The foregoing review of the historical evidence on the record reveals that there was trade of salmon for livelihood, support and sustenance purposes among the Sto:lo and with other native people and, more importantly, that such activities formed part of, and were undoubtedly rooted in, the distinctive aboriginal culture of the Sto:lo. In short, the fishery has always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. Accordingly, to use the terminology of the test propounded above, the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the Sto:lo.

The period of intensive trade of fish in a market-type economy involving the Sto:lo began after the coming of the Europeans, in approximately 1820, when the Hudson’s Bay Company established a post at Fort Langley on the Fraser River. Following that, the Sto:lo participated in a thriving commercial fishery centred around the trade of salmon. According to Jamie Morton, an historian called by the appellant to give expert opinion evidence on the history of the European trade with native people, approximately 1,500 to 3,000 barrels of salmon (with 60-90 fish per barrel) were cured per year, which the Hudson’s Bay Company bought and shipped to Hawaii and other international ports. (See also Lambert J.A., at para. 121.)

<sup>178</sup> See e.g. *ibid* at 195-96, 200, 223-25; Patricia Marchak, “Uncommon Property” in Patricia Marchak, Neil Guppy & John McMullan, eds, *Uncommon Property: The Fishing and Fish-Processing Industries in British Columbia* (Toronto: Methuen, 1987) 3 at 22; Keith Ralston, “Patterns of Trade and Investment on the Pacific Coast, 1867-1892: The Case of the British Columbia Salmon Canning Industry” (1968-69) 1 BC Studies 37 at 37-38; Duncan A Stacey, *Sockeye & Tinsplate: Technological Change in the Fraser River Canning Industry, 1871-1912*, Heritage Record No 15 (Victoria: British Columbia Provincial Museum, 1982) at 1. Recall in the last chapter how even a government fisheries report suggested that “traditional” Aboriginal fishing equipment is still comparable with the “technical and economic efficiency” of the non-Aboriginal commercial fishery. See text accompanying note 109 in chapter 3.

1800s for fruits and vegetables, and did not arrive in North America and adapted to fish until 1819<sup>179</sup>—that allowed the subsequent development of a commercial fishery on the Pacific Coast.<sup>180</sup> It took approximately another forty years for canning technology to reach the Pacific Coast, and it was not until around 1871—the same year British Columbia entered Confederation—that canneries started to permanently appear along the coast of British Columbia.<sup>181</sup> Furthermore, the mechanization of the commercial industry did not start until the 1900s,<sup>182</sup> and the industry continued to be labour-intensive until after World War I.<sup>183</sup>

The rise of the canning industry signalled the first significant interest in salmon by non-Aboriginal peoples and as the industry and related markets developed, so too did lobbying by cannery owners to regulate the fisheries.<sup>184</sup> As a result, the state acquiesced, creating the legal category of “Indian food fishery,” and limited various fishing technologies, thereby opening up the resource to non-Aboriginal interests.<sup>185</sup> Thus, not only does the Court assume pre-contact Aboriginal peoples are “simplistic” in organization and technologies due to their categorical thought, they ignore actual evidence of how much Aboriginal peoples could harvest with their

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<sup>179</sup> See e.g. John N Cobb, *The Canning of Fishery Products: Showing the History of the Art of Canning; the Methods Followed With Each Species, and Suggestions for Canning Unutilized Species; Where, When and How They Are Obtained; Together With Other Information of Much Value to Cannerymen* (Seattle: Miller Freeman, 1919) at vii; Stacey, *supra* note 178 at 2.

<sup>180</sup> See e.g. Harris, *Fish, Law, and Colonialism*, *supra* note 176 at 39.

<sup>181</sup> See e.g. *ibid* at 39, *Landing Native Fisheries*, *supra* note 58 at 35; Dianne Newell, “Dispersal and concentration: the slowly changing spatial pattern of the British Columbia salmon canning industry” (1988) 14 *Journal of Historical Geography* 22 at 23, 26 [Newell, “Dispersal”].

<sup>182</sup> See e.g. Stacey, *supra* note 178 at 2; Alicja Muszynski, “Major Processors to 1940 and Early Labour Force: Historical Notes” in Patricia Marchak, Neil Guppy & John McMullan, eds, *Uncommon Property: The Fishing and Fish-Processing Industries in British Columbia* (Toronto: Methuen, 1987) 46 at 63.

<sup>183</sup> See e.g. Newell, “Dispersal”, *supra* note 181 at 25-26, *Tangled Webs*, *supra* note 93 at 72, 86.

<sup>184</sup> See e.g. Harris, *Fish, Law, and Colonialism*, *supra* note 176 at 9, 39-40, 92, *Landing Native Fisheries*, *supra* note 58 at 35.

<sup>185</sup> Harris, *Fish, Law, and Colonialism*, *supra* note 176 at 203-05.



supposed “simple” technologies,<sup>186</sup> and deny the role Aboriginal peoples had in the *post-contact* development of the industry.

This is part of the fallaciousness of the doctrine of logical evolution: on the one hand it is an imaginative process of determining how a particular peoples/“culture” would evolve without “European influence,” thereby extracting Aboriginal peoples (and their ancestors) from their lived lives. On the other hand, Eurocentric culture is “telescoped,” to adapt a phrase of political geographer J.M. Blaut, so that the state of it and its traits are essentialized and homogenized (both spatially and temporally).<sup>187</sup> Thus, “commercial”—which was not used to refer to specific practices of trade, distinct from other practices until the late seventeenth century—is conflated with “capitalism”—a word that only started to appear in English in the early nineteenth century<sup>188</sup>:

There is no doubt that the pre-contact Coast Tsimshian economy was vastly different from today. It is important to remember, however, that even the European economy in the 18th century was not nearly as sophisticated as it became after the industrial revolution of the 19th century. Nevertheless, all the experts agree that the pre-contact Coast Tsimshian economy was not a western style capitalist one.<sup>189</sup>

By conflating, essentializing and homogenizing Eurocentric culture though, this too obviates Aboriginal lives and their contribution to the development of Eurocentric culture.

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<sup>186</sup> For example, trader Alexander Ross wrote regarding the Oregonian fisheries that “[t]he Columbia salmon ... are caught in the utmost abundance during the summer season: so that, *were a foreign market to present itself*, the natives alone might furnish 1,000 tons annually. Alexander Ross, *Adventures of the first settlers on the Oregon or Columbia River: being a narrative of the expedition fitted out by John Jacob Astor to establish the “Pacific Fur Company;” with an account of some Indian tribes on the coast of the Pacific* (London: Smith, Elder and Co, 1849) at 94 [emphasis added]. Similarly, HBC trader Peter Ogden wrote in the first half of the nineteenth century that his district needs upwards of 50,000 *preserved* salmon every year from the Aboriginal peoples. Quoted in Newell, *Tangled Webs*, *supra* note 93 at 47. These quantities surely must be enough to meet the volume/scale standards set by the Court. See e.g. *NTC Smokehouse*, *supra* note 135 at para 18. Granted, the lack of acknowledgement by the Court regarding evidence like this may be a result of Aboriginal claimants’ (and even interveners’) legal teams.

<sup>187</sup> See e.g. Blaut, *Colonizer’s Model*, *supra* note 48 at 108-09.

<sup>188</sup> Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, revised ed (New York: Oxford University Press, 1983) at 50, 70. Blaut identifies a similar process in accounts of the rise of capitalism in Europe. See e.g. *Colonizer’s Model*, *supra* note 48 at 196-97.

<sup>189</sup> *Lax Kw’alaams* (BCSC), *supra* note 16 at para 289.

This is yet another instance of the conceit of Eurocentric tunnel history: because Europe continues to be considered the core from which transformation and innovation flows from,<sup>190</sup> the role of, as Blaut calls them, “extra-European regions” (particularly the colonies of the Americas) is denied in the development of the European “capitalist industrial production system.”<sup>191</sup> Furthermore, the riches and profits Europeans gained from the Americas and the labour of its inhabitants has been argued as being crucial during the early stages of the Industrial Revolution.<sup>192</sup> Thus as noted by Satanove J. above, and similar to Vickers J. and the date of contact,<sup>193</sup> although Europeans can “change” post-contact (aided by Aboriginal peoples and their resources), post-contact “change” for Aboriginal peoples—at least within the contexts of Aboriginal rights and title—is typically associated with “European influence”: as we saw earlier in terms of how HBC–Lax Kw’alaams trade relationships were held to be “qualitatively different” than pre-contact relationships, despite the latter forming the basis of the former. Satanove’s assertion that pre-contact Coast Tsimshian economies were not “a western style capitalist one” is fine, but, as Satanove wrote above, neither was the European economy—including in terms of *scale*.<sup>194</sup> Moreover, as alluded to, “commercial” is a *specific* sense of “commerce,” the latter being “a normal English word for trade” that developed almost a century before the former.<sup>195</sup> Both these words though, in contrast to capitalism, refers to the *practice* of trading—not a particular style of trading.<sup>196</sup> But by linking commerce with capitalism, the Court asserts a tunnel history framework similar to the unilineal evolutionists of the nineteenth century: that Eurocentric capitalist, commercial exchange is the paragon for exchange in which all other

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<sup>190</sup> See e.g. JM Blaut, *Eight Eurocentric Historians* (New York & London: The Guilford Press, 2000) at 8.

<sup>191</sup> Blaut, *Colonizer’s Model*, *supra* note 48 at 204.

<sup>192</sup> *Ibid* at 204-05.

<sup>193</sup> See note 175.

<sup>194</sup> See e.g. Blaut, *Colonizer’s Model*, *supra* note 48 at 118.

<sup>195</sup> Williams, *supra* note 188 at 70.

<sup>196</sup> *Ibid*. Whereas “capitalism” refers to a particular economic *system*. *Ibid* at 50.

forms, regardless of their history of development and contexts, are compared to. Such an approach is ethnocentric, asserting another form/variation of the opposition between European and non-European, and causes further issues.

While Lamer C.J. associated “uniqueness” with “distinct” (and not “distinctiveness”),<sup>197</sup> the opposition between European and non-European/Aboriginal implies that Europeans, and therefore “European influence,” are “unique.”<sup>198</sup> Again, this is founded on basic, Eurocentric tunnel history, as prior to 1492, technologies, economic systems, and so on appear to have been similar, at least in terms of development, in Europe, Asia and Africa—and, in some circumstances, Europe lagged behind the other two regions.<sup>199</sup> Tunnel history and the naturalization of Eurocentric thought results, though, in European culture and categories being exempt from any form of integrality test. One may counter this line of argument by contending that the centrality of Europeans to Aboriginal rights is a product of European colonialism. Yet if the doctrine of logical evolution, in particular, is a metaphysical process that imagines how Aboriginal “culture” would have evolved without European influence, it is within the realm of possibility—especially given the Japanese current—that Aboriginal peoples of what became British Columbia would have come into contact with Asian peoples, and their mercantile system, at some point—whether by accident or purposively. Thus, Europeans were first to “discover” the Americas—but if being somewhere first was critical, Aboriginal rights would be completely transformed.

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<sup>197</sup> *Van der Peet* (SCC), *supra* note 1 at para 71.

<sup>198</sup> Again Justice Satanove’s finding in *Lax Kw’alaams* (BCSC) (*supra* note 16 at paras 433-34) that although Coast Tsimshian provided marine fur traders and the HBC employees with “large quantities of fresh and processed “ fish for *sustenance* through trade, this exchange, though patterned on pre-contact practice, was different in *kind* and not degree. As I will discuss in the next chapter (and touched on in chapter 1), this Eurocentric approach to cultural dynamics—through inversion and atomism—is metaphysical and divorced from lived lives. By approach cultural dynamics divested of Eurocentric dualisms, cultural pragmatics attempts to understand people’s adaption to changing contexts through the continuity of life, thereby avoiding paradoxical assertions like those Satanove makes.

<sup>199</sup> See e.g. Blaut, *Colonizer’s Model*, *supra* note 48.

Similar then to what Thomas Berger has argued with regards to *Sparrow*, the limitation of Aboriginal rights to trade to ancestral methods appears to be “invented ... out of thin air.”<sup>200</sup> The limitation appears thusly because it is a product of yet another paradox of Aboriginal rights claims: on the one hand, Aboriginal right claims must show distinctiveness in terms, mainly, of the absence of technological and institutional similarity (or “distance”) which necessitates demonstrating a lack of “modernity” (“European influence”) and complexity; while, at the same time, by having to demonstrate the supposed “simplicity” of their economies, social organization, technologies etc., the possibility and scope of Aboriginal rights claims are severely limited and restricted.

The spectre of Eurocentric tunnel history looms large, for as I have been discussing, Northwest Coast fishing was highly productive—as attested to by the commercial fishing industry and sport fishers’ protests and federal fisheries gear regulations.<sup>201</sup> Thus, the problem was not with pre-contact abilities to harvest fish (as those protests suggest), but, as pointed out above in *Lax Kw’alaams* (BCSC), the European *demand*. Ignoring the inappropriateness or double standardness of applying Eurocentric concepts and categories that were not in existence at the time of “contact,”<sup>202</sup> by opposing kinship and market economies (or whichever permutation a particular court uses<sup>203</sup>) the Court reduces each category to an inventory of specific traits.<sup>204</sup> As a result, “supply and demand” is only associated with a market economy,

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<sup>200</sup> Thomas Berger, “The Charter: A Historical Perspective” (1989) 23 UBC L Rev 603 at 606.

<sup>201</sup> See e.g. Harris, *Fish, Law, and Colonialism*, *supra* note 176 particularly ch 3; Newell, *Tangled Webs*, *supra* note 93; Evelyn Pinkerton, “Indians in the Fishing Industry” in Patricia Marchak, Neil Guppy & John McMullan, eds, *Uncommon Property: The Fishing and Fish-Processing Industries in British Columbia* (Toronto: Methuen, 1987) 249 at 252.

<sup>202</sup> See e.g. PD Groenewegen, “A Note on the Origin of the Phrase, ‘Supply and Demand’” (1973) 83 *The Economic Journal* 505.

<sup>203</sup> Granted, not all rulings adopt one of the forms of this opposition. Such a concession on my part though, only further highlights how Aboriginal rights claims are a “case-by-case lottery.”

<sup>204</sup> A pertinent trait associated with the more general Eurocentric category of “hunter-gatherer” or “forager” in this context is in the assumption ultimately deriving from Hobbes via Darwin, that peoples subsisting in this manner are

preventing pre-contact Aboriginal peoples to act in a fashion that could be considered as “cognizable” to those, or similar, principles. As a consequence, it appears that for an Aboriginal claimant to have a commercial right recognized, their ancestors had to have harvested fish *beyond* their needs for subsistence, exchange and other uses.

Another related trait the Court holds specific to the market economy category is money: “in simple economies, objects are traded without standard rates or medium of exchange. ... Highly complex economies are integrated to an extremely high degree by markets, and money makes possible the exchange of objects necessary.”<sup>205</sup> The issue then appears to be, for Satanove J. at least, the number of units of exchange: “Dr. Langdon opines that the Coast Tsimshian economy did not operate with single purpose money, but through standardized transactions of a wide variety of products according to fixed rates. True market integration was not present in the traditional, pre-contact Coast Tsimshian economy, but standard measures were developed for various materials.”<sup>206</sup> This, combined with exchange values being reliant on the “relative status and ability of the traders to negotiate,” led Satanove to conclude “that there were no standard exchange values in the pre-contact Coast Tsimshian exchange system.”<sup>207</sup> Yet if money differentiates complex/market economies from simple/kinship economies, how did the HBC traders create the “market and exchange system ... [that] cannot be attributed to the indigenous society”?<sup>208</sup> Aboriginal peoples traded with Europeans for European goods *not* European money. Moreover, this trade was based on the same principles as supply and demand:

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barely above starvation—as embodied in the “moderate livelihood” and related limitations on Aboriginal rights. See e.g. Sepez Aradanas & Tweedie, *supra* note 104 at 51; Adam Kuper, *The Reinvention of Primitive Society: Transformations of a myth* (London: Routledge, 2005) at 13-14; Tim Ingold, *The Perception of the Environment: Essays in livelihood, dwelling and skill* (London: Routledge, 2000) at 65 [Ingold, *Perception*].

<sup>205</sup> *Lax Kw’alaams* (BCSC), *supra* note 16 at para 323.

<sup>206</sup> *Ibid* at para 324.

<sup>207</sup> *Ibid* at paras 327, 329.

<sup>208</sup> *Ibid* at para 434.

As to the Indians wanting Blankets for fish it is certainly true we might get more fish or meat for a Blanket than for the same value in any other kind of Goods But as Blankets is one of the few Articles held in Estimation by the Natives about this place and for which we will only take Furs – were we to take payment in fish for Blankets the value of the latter would be so reduced in the Eyes of the Natives, we would have some difficulty in getting furs from them.<sup>209</sup>

There are numerous other contradictions, paradoxes, and double standards that could be explored to highlight the shifting sands of commercial Aboriginal rights, but those discussed so far should suffice for our purposes. What we can see though, is a structure that is set up so that only exceptional instances of harvesting and trade—where, for example, the “scale” and/or volume is so large that it would be spurious to deny the claim. Yet the armament available to the Court to deny commercial Aboriginal rights, as I have attempted to show, is varied, again creating a case-by-case lottery. This is contrary to s. 35(1) and the doctrine of Aboriginal rights: Aboriginal rights should not be, as Justice L’Heureux-Dubé argued in *Van der Peet*, “that which is left over after features of non-aboriginal cultures have been taken away”<sup>210</sup>—except that her use of “non-aboriginal” again obscures the Eurocentrism of the Court’s thought.

This structure for commercial Aboriginal rights becomes particularly evident when we look at the use of “commercial” in cases involving regulatory offense charges and treaty rights. In *R. v. Horseman*,<sup>211</sup> Mr. Bert Horseman sold the hide of a *single* grizzly bear for \$200 one year after he had shot the bear out of self defense, but prior to holding a licence to hunt grizzly bears or sell their hides.<sup>212</sup> The reason why Horseman sold the hide a year later, as noted by Justice Cory, was his state of financial need, and that it was an “isolated sale, which was *clearly not part*

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<sup>209</sup> Chief Factor McLoughlin to John Dease, 23 July 1825, HBC Archives B.223/b/1, fo 17, quoted in Mackie, *supra* note 70 at 193.

<sup>210</sup> *Van der Peet* (SCC), *supra* note 1 at para 154.

<sup>211</sup> [1990] 1 SCR 901 [*Horseman*].

<sup>212</sup> *Ibid* at paras 38-41.

of any organized commercial transaction.”<sup>213</sup> But unlike cases such as *Kapp*, where a relative lack of disadvantage was used against the Musqueam, Tsawwassen, and the pilot sales fisheries program they were participating in, Mr. Horseman’s situation had no real bearing or relevance as to whether he broke the law or not. So regardless of the lack of organized commercial transactions, the Court held that Mr. Horseman’s sale “constituted a hunting activity that had ceased to be that of hunting ‘for food’ but rather an act of commerce.”<sup>214</sup> In other words, selling a single hide once for \$200 to feed one’s family is “commercial”; selling ten salmon once for \$50 is not “commercial.” Perhaps Mrs. Van der Peet would have been more successful if she had charged more for the salmon then (or if the salmon attacked her).

The overall result of the Court’s approach to commercial Aboriginal rights, then, is based on a romanticized view where “traditional” Aboriginal culture is incompatible with profit—regardless of lived lives along with the evolution of the “modern” (Eurocentric) economy—and so to remain “authentic” Aboriginal peoples must remain poor, according to Eurocentric criteria, and frozen in the past.<sup>215</sup> Therefore, even successful Aboriginal rights claims serve to further increase and entrench the economic marginalization of Aboriginal peoples in Canada.<sup>216</sup> Why the Court and the Crown perpetuates this is baffling, as surely providing Aboriginal peoples with opportunities for economic development can only benefit Canada as a whole—much like Borrows has suggested a “truly Indigenous” Canadian law and constitution would have.<sup>217</sup>

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<sup>213</sup> *Ibid* at para 41 [emphasis added]. It is in this sense that *Horseman* and *Van der Peet*—both involving regulatory offenses—differ (aside from the role of the “Indian food fish licence” category): Mrs. Van der Peet claimed an Aboriginal right to sell fish commercially, while Mr. Horseman only argued the ability to sell hides to buy food.

<sup>214</sup> *Ibid* at paras 67-68.

<sup>215</sup> Henderson, *supra* note 26 at 211-12; Goldenberg, “Surely Uncontroversial”, *supra* note 104 at 292, “Salmon”, *supra* note 52 at 110. It is interesting in this context that Russel Lawrence Barsh and James Youngblood Henderson found that the courts seem to have applied a lower threshold to disputes that arose in Quebec than what has been used in British Columbia. “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42 McGill LJ 993 at 1005, n 44.

<sup>216</sup> See e.g. Henderson, *supra* note 26 at 211.

<sup>217</sup> See e.g. Borrows, *Indigenous Constitution*, *supra* note 17 at 15-16.

But given that the courts (much to the chagrin of the Court<sup>218</sup>) seem to be the only arena currently available to Aboriginal peoples to protect their “cultures” and rights, this position adopted by the Court represents yet another significant injustice. My proposed trans-systemic framework, and as I have argued elsewhere,<sup>219</sup> not only reconsiders how Aboriginal rights are approached in the court, it comes closer to achieving what Lamer C.J. has stated as a basic purpose of s. 35(1): “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) — ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’.”<sup>220</sup>

The conception of authenticity also creates another contradiction in terms of applying the doctrine of logical evolution. Recall from the epigraph that Lamer C.J. quoted *Sparrow* in *Van der Peet* regarding how Aboriginal rights “must be interpreted flexibly so as to permit their evolution over time.”<sup>221</sup> The contradiction that results is again due to the focus on objectified practices, customs and traditions: what is allowed to evolve in the Court’s interpretation are the objectified activities, practices, customs and traditions,<sup>222</sup> and, as is apparent for the most part with “commercial,” not the Aboriginal rights and especially *not* Aboriginal “culture.” (Note once more that the actual lives of Aboriginal peoples have no place/role.) In other words, the “atoms” can evolve, but if the cultural molecule evolves, in the sense of “adopting” new atoms/objectified

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<sup>218</sup> “While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests.” *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 14.

<sup>219</sup> “Feasting Judicial Convergence: Reconciling Legal Perspectives through the Potlatch Complex” (2013) 18 Appeal 21.

<sup>220</sup> *Delgamuukw* (SCC), *supra* note 71 at para 186.

<sup>221</sup> *Van der Peet* (SCC), *supra* note 1 at para 64, quoting *Sparrow*, *supra* note 2 at 1093.

<sup>222</sup> Again: “Logical evolution means the same sort of activity, carried on in the modern economy by modern means.” *Marshall; Bernard*, *supra* note 5 at para 25.



practices, customs and traditions framed within a change–non-change or an all-or-nothing dichotomy, it no longer remains authentic.<sup>223</sup>

But this view of “evolution” necessitates, or reinforces, a bounded, autonomous conception of culture, and highlights how the view is based on Eurocentric tunnel history as the Court generally does not find it relevant if a people’s “culture” changed or developed in response to contact with other Aboriginal peoples (or even other non-Europeans).<sup>224</sup> They lay outside the walls of the European tunnel, where “everything seems to be rockbound, timeless, changeless tradition.”<sup>225</sup> Thus, Aboriginal rights claims appear to be more easily successful when the objectified practice(s), custom(s) or tradition(s) continue to only involve Aboriginal peoples—including people from different groups—than when the objectified activity, practice, custom, tradition and/or right “evolves” to incorporate non-Aboriginal (European) peoples. In this we can again see how the doctrine of logical evolution is an imaginative, metaphysical process, and is an interpretative approach to Aboriginal rights that Andrea Bowker has labeled as “simply absurd”: “It gives no weight to the idea that Aboriginal rights may ‘evolve’ in response to changing circumstances.”<sup>226</sup> This interpretation and implications should not be a surprise though, as it evinces the atomism of the Court’s approach where the parts can be decontextualized and isolated, without altering them, for consideration.

Importantly, if the Court’s atomism decontextualizes objectified activities, practices, customs and traditions, how can they “evolve”? Further, in synthesizing the *Marshall*; *Bernard*, *Mitchell v. M.N.R.* and *Sappier* rulings, Justice Vickers highlights the tension of “continuity” and the doctrine of logical evolution, by distinguishing “practice” from “activity”: “practice is

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<sup>223</sup> Barsh & Henderson, *supra* note 215 at 1002. Aboriginal peoples, then, “apparently can eat a tradition, but they cannot market it.” *Ibid* at 1005.

<sup>224</sup> See e.g. Borrows, *Indigenous Constitution*, *supra* note 17 at 262.

<sup>225</sup> Blaut, *Colonizer’s Model*, *supra* note 48 at 5.

<sup>226</sup> “*Sparrow’s Promise: Aboriginal Rights in the B.C. Court of Appeal*” (1995) 53 UT Fac L Rev 1 at 33-34.

allowed to evolve, but the ‘activity must be essentially the same’.”<sup>227</sup> Therefore, while the Court asserts that “continuity allows the logical evolution of Aboriginal rights but within certain limits,”<sup>228</sup> what the Court implies is that the objectified practices, customs and traditions that they have created via inversion have an “unshakable core” which can have superficial modifications, while still remaining, in the Court’s eyes, “the same.” A similar process/approach, though, is not applied to activities. And so the Court again reaffirms their role as arbiters of authenticity, but in this context they apparently have the power to determine how objectified practices, customs and traditions would develop over time. In other words, the doctrine of logical evolution is also an ethnographic project through which the Court determines what the contemporary “traditional” culture of Aboriginal claimants is or could/“should” be. Thus, this doctrine provides a complement to the process of authentication of pre-contact “culture” discussed in the last chapter.<sup>229</sup>

Aboriginal fishing “carried on in the modern economy by modern means” then appears to mean that Aboriginal peoples can use contemporary technologies. But what of fishing in the “modern economy”? Perhaps the difference lies in the supposed introduction of a “telescoped,” fully developed market system of exchange at the time of contact (and has not “changed” in the interim), while acknowledging that technologies have changed and developed. This only serves to introduce further inconsistencies and questions—particularly in terms of what “European influence” means or what counts as “influential.”

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<sup>227</sup> *Tsilhqot’in*, *supra* note 76 at para 1179.

<sup>228</sup> *Ibid.*

<sup>229</sup> This power of authentication, and thereby determining what the “authentic”/“traditional” culture of an Indigenous peoples is, is also apparent in the United States (at least): “Whether the court’s characterization of Coast Salish culture was correct in 1974, it has become more valid over the years—due, in some part, to the court itself.” Russel Lawrence Barsh, “Backfire From Boldt: The Judicial Transformation of Coast Salish Proprietary Fisheries into a Commons” (1991) 4 *Western Legal History: The Journal of the Ninth Judicial Circuit Historical Society* 85 at 102.

Moreover, surely the “in the modern economy” aspect of the doctrine of logical evolution suggests that objectified practices, customs and traditions could take on commercial features based on the reasoning used for “modern means.” Fishing on the Northwest Coast is constantly affirmed by the courts as being integral,<sup>230</sup> and *how* these Aboriginal peoples generally fish today, unless breaking a technological regulation, seems never to be disputed either.<sup>231</sup> Selling the product of the activity of fishing (even for sustenance purposes) is, or should be, the logical evolution of fishing—following the Court’s reasoning. Aside from whether or not a particular court follows this reasoning, though, a barrier to this evolution is, again, the situational influence of the legislated limitation of the “Indian food fishery” category that, contrary to *Sparrow*,<sup>232</sup> has resulted in the distorted characterization of their fishing as being for food, social and ceremonial purposes, or, simply, for sustenance/subsistence purposes. Thus, even if “commerce” is linked to European culture, if “modern means” are allowable, why can “traditional” subsistence purposes not evolve commercial aspects? What else could “in the modern economy” mean but the sale for money? If the means of fishing can be both “traditional” and “modern” according to the doctrine of logical evolution, why is it when we turn to the place of fishing “in the modern economy” it remains exclusively “traditional” (as imagined through the *Fisheries Act*)? In other words, “evolution” seems to apply to the practice itself, while “continuity” limits the objective.<sup>233</sup>

This is once more only possible through the inversion of life, and highlights the influence of the Eurocentric conceptualization of personhood that divides human existence in two. The practice/custom of fishing, as discussed in chapter 2, is an interaction in the world of “nature,”

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<sup>230</sup> For example, in *Ahousaht*, *supra* note 131 at para 202 Garson J said that it is not disputed that the Nuu-chah-nulth were a “fishing people” both before and after contact.

<sup>231</sup> Based on the lack of charges and/or litigation.

<sup>232</sup> See *supra* note 92 and accompanying text.

<sup>233</sup> This is similar to Guy Charlton’s observation about post-*Sappier* determinations of logical evolution. “Letting go of Culture: A Comment on *R. v. Sappier*; *R. v. Gray*” (2007-2008) 39 *Ottawa L Rev* 317 at 330-31.

leaving it removed from the sphere/world of society, making it residually *non-social*.<sup>234</sup>

Distribution of the outcome of fishing is then an interaction in the sphere of society, and through the logic of inversion, this appears how/why the Court is able to place limits on “evolution.” In other words, paralleling the Eurocentric distinction of evolution and history, the “evolution” of fishing is a “natural” process and is a difference in degree, while “continuity” is a “cultural” one so that any differences are in kind—not degree.<sup>235</sup> Furthermore, this duality is reflected in what the supposed objective of the *Van der Peet* analysis is: “to provide cultural security and continuity for the particular aboriginal society.”<sup>236</sup> This objective again appears to ignore or contradicts that Aboriginal rights are “equal in importance and significance to the rights enshrined in the *Charter*.”<sup>237</sup> Therefore, while the Court has stated that “aboriginal rights must be viewed differently from *Charter* rights,”<sup>238</sup> this does not, or should not, again mean that a successful claim to an Aboriginal right comes at the cost of Aboriginal peoples’ rights as Canadians. Thus, “continuity,” regardless of how loosely/flexibly applied by the Court, serves to undermine the very purpose of s. 35(1) and perpetuates the historical injustices that Aboriginal peoples seemingly continue to suffer—despite Chief Justice Lamer’s warning in *Delgamuukw v. British Columbia*.<sup>239</sup>

By limiting Aboriginal rights to the protection of culture, particularly pre-contact culture (even in a “logically evolved” form), there are significant implications for Aboriginal peoples’

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<sup>234</sup> See e.g. Ingold, *Perception*, *supra* note 204 at 318.

<sup>235</sup> See e.g. *ibid* at 109.

<sup>236</sup> *Lax Kw’alaams* (BCSC), *supra* note 16 at para 10. Note how this objective has no mention of the security and continuity for the *actual people* of that society; which is something the Attorney General of Nova Scotia argued in *Sappier*: “nothing in the jurisprudence of s. 35 suggests that ‘aboriginal rights’ are meant to secure native physical survival. ... Rather, the objective of s. 35 is to promote native *cultural* survival.” FoNS, *supra* note 26 at para 70 [emphasis in original].

<sup>237</sup> *Van der Peet* (SCC), *supra* note 1 at para 19.

<sup>238</sup> *Ibid*.

<sup>239</sup> *Delgamuukw* (SCC), *supra* note 71 at para 153: “To impose the requirement of continuity too strictly would risk ‘undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect’ aboriginal rights to land.”

lives and interactions today. As discussed above, the Court's use of "continuity" perpetuates their static view of culture and cultural dynamics by setting limits on change.<sup>240</sup> This is partly a product of how Lamer C.J. conceived the "Aboriginal" side of Aboriginal rights in a retrospective manner: "It is about what was, 'once upon a time,' central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today."<sup>241</sup> And through dispositionism and inversion, Aboriginal peoples are either stuck as "traditional" (and authentic) or are considered assimilated (and "inauthentic"). Thus, Euro-Canadian history is telescoped, while Aboriginal peoples are frozen, for most intents and purposes, at contact. For example, the notion of varying levels of social organization arose from Eurocentric evolutionary thought to justify the supposed superiority and development of European culture, with non-European peoples/cultures taken as representing earlier stages in that single line of development. As a result, the whole "civilizing" aspect of the Eurocentric colonial project was based on the belief that "barbarians" and "savages" could be brought "closer" to "civilization." So while this evolutionary thought underpins the Court's categorical thought, they ignore or deny it in their limitations on Aboriginal rights: therefore, because the Stó:lō were determined to be at a band level of social organization at the time of contact, the Court found this "suggestive ... that the exchange of fish was not a central part of Sto:lo culture," concluding that "[t]he appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*."<sup>242</sup> Apparently, then, in the eyes of the Court, once a band, always a band.

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<sup>240</sup> See also Niezen, *supra* note 22 at 8, 10; John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 Const Forum Const 27 at 32 [Borrows, "The Trickster"].

<sup>241</sup> *Ibid* at 28-29.

<sup>242</sup> *Van der Peet* (SCC), *supra* note 1 at paras 90-91.

By reproducing the nineteenth century unilineal evolutionary thinking that Justice Hall warned about in *Calder v. Attorney-General of British Columbia*,<sup>243</sup> and by denying the lives of Aboriginal peoples the Court, by implication, denies (or at least brings into question) their humanity: “Change ... is not only essentially human, but also essential for survival in a world of changing ecological and political forces.”<sup>244</sup> Thus, by placing limitations on “change” the Court gives legal backing in Canada to Eurocentric tunnel history by denying Aboriginal peoples the ability to innovate and adapt while still remaining distinctive—like all other Canadians apparently can.<sup>245</sup> Perhaps this is a product of the Court’s Eurocentric bias, where the logic of inversion et al. limits “distinctiveness” to autonomous, disembodied, objectified practices, customs and traditions viewed in isolation. This is supported by Chief Justice Lamer’s definition of “distinctive,” and would result in, following my understanding of the Court’s logic, the fact that change, innovation, and adaptation are common to *all* humans and collectivities of humans, they can then not be considered distinctive and integral.<sup>246</sup>

Rejecting this cultural dynamism for Aboriginal peoples once more betrays the Eurocentric tunnel history that grounds the Court’s reasoning. And while the Court may believe, or hold, that Europeans drastically altered the lives of Aboriginal peoples—more so than any other “influence”—they seem unwilling to allow Aboriginal peoples the ability to adapt to the injustices of colonialism and remain “authentic” (in the sense of objectified practices, customs and traditions that could be recognized and affirmed as Aboriginal rights). Perhaps this is akin to Justice Bastarache’s point “that there is no such thing as an aboriginal right to sustenance. Rather, ... the traditional *means* of sustenance, meaning the pre-contact practices relied upon for

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<sup>243</sup> *Supra* note 61 at 346.

<sup>244</sup> Henderson, *supra* note 26 at 208.

<sup>245</sup> See e.g. Niezen, *supra* note 22 at 10; Borrows, “The Trickster”, *supra* note 240 at 32.

<sup>246</sup> See e.g. *Van der Peet* (SCC), *supra* note 1 at para 56.

survival, can in some cases be considered integral.”<sup>247</sup> Maybe it could also be due to possible questions such an acknowledgement could mean for Crown sovereignty and colonialist policies that continue under various guises today. The doctrine of logical evolution, then, is not “evolution” in its original sense of unrolling or unfolding something,<sup>248</sup> but is similar to my argument regarding the Eurocentric conception of change and tradition.<sup>249</sup> This is why Chief Justice Lamer’s conception of continuity does not require an “unbroken chain”: not only does his conception omit situational influences to the cessation of a practice, custom or tradition, it is also a retrospective social attribution in that it assumes a coherence of isolated events/times inverted from the lives of people.<sup>250</sup> “Continuity,” then, is determined by comparing *only* the “pre-contact” with the contemporary, resulting in connection being reduced to a particular, specific “Aboriginalness”—which also becomes converted into a cultural trait, thereby allowing the “non-Aboriginal” to represent supposedly inauthentic or introduced aspects of a culture.

Therefore, this atomistic approach results in the Court failing to avoid reducing Aboriginal peoples’ lives (qua “culture”) to a collection of “specific anthropological curiosities”<sup>251</sup> and perpetuates the colonialist domination of Aboriginal peoples,<sup>252</sup> by reifying (and legally entrenching) the shackles of “tradition”<sup>253</sup> and *not* allowing them to creatively innovate and adapt to the (continually) changing world around them. This is, again, tantamount to denying the aliveness—at least as humans—of Aboriginal peoples. Furthermore, by dismissing objectified practices, customs or traditions as inauthentic due to the tools used or what have you, the Court also denies Aboriginal peoples “the potential to ever behave in an

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<sup>247</sup> *Sappier*, *supra* note 41 at para 37.

<sup>248</sup> Williams, *supra* note 188 at 120.

<sup>249</sup> See *supra* note 18 and accompanying text.

<sup>250</sup> See discussion on 21-22, above.

<sup>251</sup> *Sappier*, *supra* note 41 at para 46.

<sup>252</sup> *Contra Côté*, *supra* note 108 at para 53.

<sup>253</sup> See e.g. Tim Ingold, “The Art of Translation in a Continuous World” in Gísli Pálsson, ed, *Beyond Boundaries: Understanding, Translation, and Anthropological Discourse* (Oxford: Berg, 1993) 210 at 212.

‘authentic’ way—in a way that serves their needs in the present and exhibits some level of continuity with their shared past.”<sup>254</sup> As I hope to have shown in Part I of this thesis, it is my contention that this is due to the Court’s Eurocentric formulation of “culture.”

To conclude, the legal distinctions the Court imported, created and uses in its analysis of Aboriginal rights are very problematic. As Duncan Kennedy has argued, the success of any legal distinction depends on two facets:

First, it must be possible to make the distinction: people must feel that it is intuitively sensible to divide something between its poles, and that the division will come out pretty much the same way regardless of who is doing it. Second, the distinction must make a difference: a distinction without a difference is a failure even if it is possible for everyone to agree every time on how to make it. Making a difference means that it seems plain that situations should be treated differently depending on which category of the distinction they fall into.<sup>255</sup>

Given that most, if not all, of the concepts the Court uses are vague, none of their legal distinctions conform to Kennedy’s test. They are, as I have attempted to show, arbitrary and inconsistent. They fail to comprehend difference and distinctiveness between Aboriginal law and legal systems and the British common law. Instead of reconciling these distinct legal systems through the weaving of an intersocietal constitutional law that is capable of governing the interaction between shared lives,<sup>256</sup> the Court has privileged the common law system. The courts failed to see and understand what is different and what is similar in the legal systems. They have failed to fairly conceive the contemporary relationships between the distinctive legal systems. They have not sought, and have failed, to construct an intermediary, bridging body of

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<sup>254</sup> Douglas Deur, “The Hunt for Identity: On the Contested Targets of Makah Whaling” in Jim Norwine & Jonathan M Smith, eds, *Worldview Flux: Perplexed Values among Postmodern Peoples* (New York: Lexington Books, 2000) 145 at 170.

<sup>255</sup> Duncan Kennedy, “The Stages of the Decline of the Public/Private Distinction” (1982) 130 U Pa L Rev 1349 at 1349.

<sup>256</sup> As Lamer CJ concluded his judgement in *Delgamuukw*: “Let us face it, we are all here to stay.” *Supra* note 71 at para 186.



constitutional principles and mechanisms to govern the relationships between Aboriginal and non-Aboriginal peoples and legal systems. They have attempted to trump the distinct internal Aboriginal laws, legal systems and perspectives with the internal common law of the settler community in their attempts at translating, in the contexts of the discussion in this chapter, the contemporary commercial marketplace and law.

In summary, I have attempted to show over the course of Part I that in the contexts of Aboriginal rights, the Canadian common law system does not have a few, specific biases and/or problems that can be easily remedied; rather, it is inherently biased against Aboriginal peoples that systematically and structurally denies, or places onerous burdens on, their rights that they possess not only constitutionally but “because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”<sup>257</sup> None of the doctrines or theories that have been advanced to justify the marginalization (or rejection) of Aboriginal rights, legal traditions and lives serve to reconcile this “simple fact” of Chief Justice Lamer’s.<sup>258</sup>

Moreover, I have explored how the focus on culture has created an arbitrariness to the Court’s rulings.<sup>259</sup> For example, Satanove J., as discussed above, used “proto-contact” in terms of European influence in *Lax Kw’alaams*, while Vickers J. acknowledged, a number of times, in *Tsilhqot’in Nation v. British Columbia* “that the horse arrived from Europe. However, there is no evidence in this case to connect the arrival of horses in Tsilhqot’in territory with first European contact. I find that horses arrived in this area at a time that preceded the arrival of the first

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<sup>257</sup> *Van der Peet* (SCC), *supra* note 1 at para 30 [underlining in original].

<sup>258</sup> See e.g. Borrows, *Indigenous Constitution*, *supra* note 17 at 20. The theories Borrows discusses are based on ideas of discovery, occupation, prescription, and conquest.

<sup>259</sup> See e.g. Michael Asch, “The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*” (2000) 5 Rev Const Stud 119 at 133.

Europeans.”<sup>260</sup> In other words, one justice held that “proto-contact” was significant in determining the success of a particular claim, while the other held it was not. Aboriginal rights should not be littered with contradictions and based on the case-by-case whims of the judiciary that turns claims into a lottery, as this goes against the principles of fundamental justice.

Furthermore, the “Aboriginal perspective” is about more than just what “kinship,” “culture” or other Eurocentric categories may mean. It refers to a multiplicity of different “ways of life”: the meshworks of epistemologies, ontologies, legal systems and so on that, in Eurocentric thought, are atomized and inverted. The Court’s approach to reconciliation by way of “cognizable” to their categorical thought is disingenuous, directly contradicts what they have stated, and only serves to reify, perpetuate and further entrench the colonialist marginalization of Aboriginal peoples, their lives and “cultures,” and their rights.

In the remainder of this thesis, I will attempt to “re-enliven” Aboriginal rights, by outlining an alternative approach that is based on creating a trans-systemic space where the common law (in particular) and Aboriginal legal systems can intertwine, thereby aiming to formulate a truly “indigenous” Canadian legal system in the sense of it being “home-grown in its place of application” that will provide a more solid, legitimate and broader foundation to Canadian law.<sup>261</sup> The Court itself has stated that the *Constitution* “must ... be capable of growth and development over time.”<sup>262</sup> Growth is a *life* process of ontogenetic development, and I will now turn to exploring what Aboriginal rights can look like when we replace “culture” with life and growth.

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<sup>260</sup> *Supra* note 76 at para 1209.

<sup>261</sup> Borrows, *Indigenous Constitution*, *supra* note 17 at 11, 21.

<sup>262</sup> *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 155, cited in *Van der Peet* (SCC), *supra* note 1 at para 21. The view of law as involving organic growth or as “living” can be traced as far back as the late eleventh and twelfth centuries. Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 5-7, 9.

# *PART II*

## Enlivening Aboriginal Rights

# 5

## (Re)Weaving Trans-Systemic Indigenous Aboriginal Rights

Section 35(1), it is true, recognizes and affirms existing aboriginal *rights*, but it must not be forgotten that the rights it recognizes and affirms are *aboriginal*.

...  
*Aboriginal* rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are *aboriginal*.

*per* Lamer C.J.<sup>1</sup>

The next step in the analysis, according to *R. v. Van der Peet* and *Mitchell v. M.N.R.*, is for the plaintiffs to establish the aboriginal right protected under s. 35(1) of the *Constitution Act, 1982*. They must do this by proving the existence (and continuity in modern form) of the ancestral activity upon which the right is based, and its integrality with the distinctive aboriginal culture of the pre-contact society from which the plaintiffs claim to have descended.

...  
“Aboriginality” means more than interesting cultural practices and anthropological curiosities. Culture on its own is a difficult concept to grasp. It has implicitly been taken to mean a fixed inventory of traits or characteristics. Distinctive aboriginal culture must be taken to refer to the reality that despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands. The focus of the court should be on the nature of this prior occupation.

*per* Satanove J.<sup>2</sup>

Nobody said it was gonna be easy  
It's only as hard as it seems

*per* Nelson<sup>3</sup>

A golden thread that runs throughout my examination of the Court's use and conception of culture and related notions in the last chapter was the influence of the relational approach,

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<sup>1</sup> *R v Van der Peet*, [1996] 2 SCR 507 at paras 17-19 (SCC) [*Van der Peet* (SCC)] [emphasis in original].

<sup>2</sup> *Lax Kw'alaams Indian Band v Canada (AG)*, [2008] 3 CNLR 158 at paras 121-23.

<sup>3</sup> Willie Nelson, “Nobody Said It Was Going to Be Easy,” by Willie Nelson and Mickey Raphael, on *Music from Songwriter*, Columbia Records.

through which I was able to highlight the multitude of contradictions and issues in how Aboriginal rights claims are handled in the courts. In this chapter, I will attempt to illustrate how the relational approach can be adapted from anthropology by the courts into a more equitable method for Aboriginal rights claims by dislodging them from the Eurocentric foundations demonstrated in the preceding. It is my contention that this approach in the courts can provide a more solid foundation from which a trans-systemic framework for determining Aboriginal rights claims can be developed. But, as Willie Nelson sang, “Nobody said [this] was gonna be easy.”

In this chapter, then, I will first lay out the reasons for why Aboriginal rights determinations should be based on the situation of prior occupation that the doctrine of Aboriginal rights is founded upon. In doing so I will continue to question the Court’s conception of “culture” and attempt to explain why Chief Justice Lamer placed it, and not the situation, at the core of Aboriginal rights. This leads me into reformulating the idea of “way of life” that I then build my proposal for a trans-systemic framework upon. This framework is based on the relational approach and instead of focusing on “culture,” it takes individuals as they dwell in a relational network that includes other beings and the world as its starting point. Through the examples of houses and house styles, making a book shelf, and weaving, I illustrate my proposed framework and show how it accords with both the common law and Aboriginal legal systems, as well as how it may overcome many of the issues the Court’s erratic approach has created.

One implication of my proposed framework and method is that it results in an Aboriginal right to self-determination, as I argue that this is necessary to truly take into account the Aboriginal perspective. In turn, this implies a reformulation of Canadian sovereignty and so I then discuss the notion of “shared sovereignty” that even the Court has said is a product of the patriation of our constitution. This idea of “shared sovereignty” also means that the various legal

and governmental orders in Canada must be converged; and to illustrate the form this convergence may take, I conclude by returning to the potlatch complex among coastal British Columbian First Nations that I discussed in the Preface.

*It is important to be mindful throughout this chapter, but especially in the concluding discussion of convergence, that while the language I use here may appear similar to that used in jurisprudence and legal thought, this is more a product of this thesis being written in English and the limitations (and even distortions) that result.* This qualification further highlights the need for self-determination as Aboriginal peoples should be equal partners in governance, creating a shared language, and not just in a “cognizable” form.

## **I. Situating Aboriginal Rights**

In Part I, I pointed out the dispositionist assumptions that the Court uses in determining Aboriginal rights. For example, although never explaining or justifying why objectified practices, customs and traditions are predominant in defining Aboriginal rights, the Court in *R. v. Van der Peet* instead “imagined a judicial test for identifying Aboriginal rights that focused on conduct that reveals the hidden, particular elements of those pre-colonial distinctive societies.”<sup>4</sup> And so eating pizza, having lighted tennis courts or Federal Express making deliveries<sup>5</sup> are dispositionalized as Aboriginal peoples being assimilated, “inauthentic,” and, in the Canadian

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<sup>4</sup> James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006) at 182 [Henderson, *First Nations Jurisprudence*].

<sup>5</sup> While some of these examples were ones used by the Progressive Animal Welfare Society in a brochure used to question the authenticity of the revival of whaling by the Makah of Washington State (Charlotte Coté, *Spirits of our Whaling Ancestors: Revitalizing Makah & Nuuchah-nulth Traditions* (Seattle: University of Washington Press 2010) at 154), it is, as suggested by the inclusion of eating pizza, founded on the same reasoning as the “pizza test” calculus discussed in the last chapter. As well, similar to Aboriginal rights cases in Canada, dispositional assimilationist arguments have been used in Indigenous rights cases in Washington State. See e.g. Jay Miller, “The Shell(Fish) Game: Rhetoric, Images, and (Dis)Illusions in Federal Court” (1999) 23:4 *American Indian Culture & Research Journal* 159 at 166; Bruce G Miller, “Culture as Cultural Defense: An American Indian Sacred Site in Court” (1998) 22 *American Indian Quarterly* 83 at 89.

context at least, ends claims for the recognition and affirmation of their Aboriginal rights to question.

Jon Hanson and his colleagues proposed the idea of “situationism” to correct the fundamental attribution error that creates the overestimation of the influence of dispositions in life generally, but especially in legal theorizing and law making.<sup>6</sup> The converse of this overestimation, according to Hanson, is that the role of situational influences is underestimated.<sup>7</sup> For Hanson, then, the situation “is part of the human predicament: it is in and around us, it is influencing us, and it is doing so in ways that we do not appreciate, do not understand, do not have a place for in our theories, and do not individually or dispositionally control,” and includes “anything that influences our attitudes, memories, cognitions, emotions, behaviors and the like.”<sup>8</sup> So in contrast to attributing behaviours and actions to individual dispositions, Hanson’s situationism considers the role and influences of the situation has on people’s actions and behaviours. In other words, according to situationism, if the situation changes so too will the actor’s behaviour.

The placement of “culture” at the core of the Court’s test for Aboriginal rights is a product of their dispositional bias. Following Hanson’s argument, this bias could possibly be corrected through a better understanding of the situation.<sup>9</sup> A problem with Hanson’s situationist proposal, though, is that he too misses a situational influence in his own work: Eurocentric epistemology. So while he acknowledges that culture is a situational influence,<sup>10</sup> Hanson’s (over)reliance on the insights provided by social psychology forces him to view humans as

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<sup>6</sup> Jon Hanson & David Yosifon, “The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture” (2003) 152 U Pa L Rev 129 [Hanson & Yosifon, “The Situation”].

<sup>7</sup> *Ibid* at 136.

<sup>8</sup> Jon Hanson & David Yosifon, “The Situational Character: A Critical Realist Perspective on the Human Animal” (2004) 93 Geo LJ 1 at 33-34 [Hanson & Yosifon, “The Situational Character”].

<sup>9</sup> Hanson & Yosifon, “The Situation”, *supra* note 6 at 346.

<sup>10</sup> *Ibid* at 255-56.

“animal plus”<sup>11</sup> and to take an overly cognitive approach. Therefore, Hanson reproduces the Eurocentric Cartesian dualism that separates, as we have seen, mind from body, actions from ideas, and mental from material (to just mention a few).

It is here that I argue the relational approach can expand and develop Hanson’s situationism through formulating an approach that is not based on the Cartesian dualism. This is not a wholesale rejection of Hanson’s proposal, as there is one significant situational influence that *should* inform the Court’s approach to Aboriginal rights, but, due to the fundamental attribution error, they miss: “when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”<sup>12</sup> *This* is the situation that should inform Aboriginal rights determinations.

Some may recognize that quote as being what Lamer C.J. wrote as the “one simple fact” for why the doctrine of Aboriginal rights exists and is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.<sup>13</sup> But, as alluded to earlier, if the purpose of this doctrine and s. 35(1) is “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown,”<sup>14</sup> why is, aside from dispositionist assumptions, “distinctive culture” not only involved but given such prominence?<sup>15</sup>

Part of the reason most likely originates in nineteenth century jurisprudence discussed in chapter 2. When positivists of that era were attempting to construct a system of international law,

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<sup>11</sup> That Hanson implicitly accepts the animal plus conception can be seen in his assertion that situationism provides “a more realistic depiction of the *human animal*” which he refers to as the “situational character.” Hanson & Yosifon, “The Situational Character”, *supra* note 8 at 6 [emphasis added].

<sup>12</sup> *Van der Peet* (SCC), *supra* note 1 at para 30 [underlining in original].

<sup>13</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>14</sup> *Van der Peet* (SCC), *supra* note 1 at para 31.

<sup>15</sup> Furthermore, in all of the jurisprudence Lamer reviews (both Canadian and international), they all support Aboriginal rights *being grounded in prior occupation and not “culture.”* *Van der Peet*, *supra* note 1 at paras 33-41.



the sovereign was claimed to be the exclusive basis for that system.<sup>16</sup> But legal scholar Antony Anghie points out that it was the Eurocentric concept of “society” that was instead central to the legal construction due to the link between society and law the positivists needed: “Society, therefore, provides the matrix of ideas, the analytical resource that, allied with sovereignty, could establish a positivist international legal order.”<sup>17</sup> This matrix of ideas provided by the “society” of the Eurocentric social sciences allowed the positivists to formulate and develop various *cultural distinctions* that were key in formulating their “sovereignty doctrine.”<sup>18</sup> To establish the translation of cultural differences, as alluded to in chapters 1 and 2, positivists needed more than the civilized–uncivilized distinction.

One answer to this was “that sovereignty could be most clearly defined as control over territory.”<sup>19</sup> A result of placing territorial control as being fundamental to the status of sovereignty, so-called “wandering tribes” were excluded.<sup>20</sup> But this still did not exclude some non-European states, and so the positivists returned once more to the concept of society.<sup>21</sup> In turn, this allowed the positivists to argue that sovereignty and society were two different tests, where “society,” qua civilized–uncivilized, determined if a non-European state or peoples were part of international society. Therefore, although uncivilized tribes/states could be sovereign, if they did not meet the Eurocentric standard of “society,” and were then not part of international

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<sup>16</sup> Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” (1999) 40 Harv Int’l LJ 1 at 17.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* at 26.

<sup>20</sup> *Ibid.* at 27. This is ironic, as mentioned in chapter 2, as the “wanderings” of such tribes paled in comparison to Europeans. See e.g. Hugh Brody, *The Other Side of Eden: Hunter-Gathers, Farmers and the Shaping of the World* (London: Faber and Faber, 2001) at 87-90, 159-60. Furthermore, while using their “wandering” to exclude non-Europeans from the status of sovereignty, the colonial wanderings of Europeans was used to define their control over territory.

<sup>21</sup> Anghie, *supra* note 16 at 27-28.

society, they were excluded from the realm of international law.<sup>22</sup> “It follows,” writes Anghie, “despite positivist preoccupations with sovereignty doctrine, that ‘society’ and the ‘family of nations’ are the essential foundation of positivist jurisprudence and the vision of sovereignty that it supports. In the final analysis, non-European states are lacking in sovereignty because they are excluded from the family of nations.”<sup>23</sup>

The wandering positivists further justified the exclusion of the non-European world from international law in a number of ways. One of these strategies involved asserting, based on the civilized–uncivilized distinction (and seemingly hinting at the Hobbesian state of nature), that no law existed in some non-European, “barbaric” regions.<sup>24</sup> The overall picture Anghie describes in terms of the sovereignty doctrine, as we saw to some extent in chapter 2, is that the ideas of “sovereignty” and “law” were constructed much like the unilineal cultural evolutionary schemes of the same period, where both were based on ethnocentric reasoning, concepts and standards, where “sovereignty”—like “civilization”—was the exclusive purview of (and defined by/as) Europe.<sup>25</sup> Unfortunately, unlike Chief Justice Lamer in *R. v. Gladstone* where he acknowledged the link between “commerce” and Europe,<sup>26</sup> the Court, overall, seems to ignore the Eurocentrism of the construction and definition of the idea of sovereignty. “Sovereignty,” then, is an abstraction or even a fiction that was produced to justify relationships between, especially for our concerns here, European colonizers and Aboriginal peoples.<sup>27</sup>

I argue that by treating “society” and “sovereignty” separately (in the sense of having two, separate tests for each), the nineteenth century positivists laid the foundation for the

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<sup>22</sup> *Ibid* at 28.

<sup>23</sup> *Ibid*.

<sup>24</sup> *Ibid* at 29; James (Sákéj) Youngblood Henderson, “The Context of the State of Nature” in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 11 at 27 [Henderson, “State of Nature”].

<sup>25</sup> See generally *ibid*.

<sup>26</sup> [1996] 2 SCR 723 at para 28 [*Gladstone*].

<sup>27</sup> Henderson, “State of Nature”, *supra* note 24 at 28.

contemporary Court's restricted conception of Aboriginal rights which avoids the fundamental political question regarding the Crown's assertion or acquisition of sovereignty in Canada.<sup>28</sup> Returning back to the "split existence" and Julian Steward's notion of the culture core discussed in chapter 2, the Court has attempted to limit Aboriginal rights so that they do not include abstract rights—such as to sovereignty or other political rights.<sup>29</sup> "Sovereignty," and similar terms, are part of the social sphere of human interactions, while the vast majority of objectified practices, customs and traditions that Aboriginal rights claims deal more with interactions within the sphere of "nature." John Borrows' discussion of *R. v. Pamajewon*,<sup>30</sup> while not totally dealing with practices in the "sphere of nature," highlights how the restrictive focus on form (objectified practices, customs and traditions) concretizes Aboriginal rights:

[I]n *Pamajewon* it would not be an unfair reading of the case to observe that the appellants were asserting a right to self-government. However, since rights to Indian self-government have not yet been explicitly recognized in Canadian jurisprudence, the Supreme Court considered that assertions of Aboriginal rights to self-government were cast at a level of "excessive generality." The court observed that if section 35(1) rights encompass claims to self-government, which it did not decide, one *must consider these claims in light of specific practices integral to the pre-contact Aboriginal culture*. The Court's re-characterization of the right illustrated its unwillingness to consider self-government rights on any general basis.<sup>31</sup>

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<sup>28</sup> See e.g. Avigail Eisenberg, "Reasoning about Identity: Canada's Distinctive Culture Test" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 34 at 49; Michael Asch, "The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*" (2000) 5 Rev Const Stud 119 at 133 [Asch, "Judicial Conceptualization"], "Calder and the Representation of Indigenous Society in Canadian Jurisprudence" in Hamar Foster, Heather Raven and Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 101 at 109-10.

<sup>29</sup> Asch, "Judicial Conceptualization", *supra* note 28 at 134. Anthropologist Michael Asch also asserts that by framing Aboriginal rights as a way to reconcile distinctive cultures with the sovereignty of the Crown, "assertions of Aboriginal rights could not be used to challenge sovereignty and jurisdiction." *Ibid.* But compare with what the Court wrote in *Haida Nation v British Columbia (Minister of Forests)* ([2004] 3 SCR 511 [*Haida Nation*]) at para 20: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*."

<sup>30</sup> [1996] 2 SCR 821 [*Pamajewon*].

<sup>31</sup> John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am Indian L Rev 37 at 47-48 [emphasis added; citations removed]. Once more the Court enfolded Indian Affairs policy into their discussions of constitutional rights similar to what I noted in chapter 4 in the contexts of Aboriginal rights to fishing, particularly commercial fishing.

Thus, the Court has placed the load of the definition of Aboriginal rights on the word “distinctive,” removing their determination from the Eurocentric realm of politics and reascribing them onto the Eurocentric realm of the cultural.<sup>32</sup>

How was it that Chief Justice Lamer shifted the doctrine of Aboriginal rights from its source in Aboriginal peoples’ prior occupation to the cultural focus of the test he developed? The key is when he turns to illustrate how the “legal literature also supports the position that s. 35(1) provides the constitutional framework for reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty.”<sup>33</sup> The first source Lamer mentions is Mark Walters’ comment<sup>34</sup> on British Columbia Supreme Court (BCSC) decision in *Delgamuukw v. British Columbia*,<sup>35</sup> which Lamer cites as suggesting “that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures.”<sup>36</sup> Lamer then proceeds to quote from Walters’ commentary that begins with, “The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures.”<sup>37</sup> The rest of the quoted passage, like this passage here, *only* mentions legal cultures and perspectives—*not* sovereignty.<sup>38</sup> In other words, the passage quoted from Walters supports reconciling distinct (legal) *cultures*, *not* Aboriginal cultures or sovereignties with Crown sovereignty. Further, is not this latter position reflective of the two Great Divides of

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<sup>32</sup> Asch, “Judicial Conceptualization”, *supra* note 28 at 134.

<sup>33</sup> *Van der Peet* (SCC), *supra* note 1 at para 42. This transformation serves to once more to marginalize the perspectives of the Aboriginal peoples already living in communities on the land, and participating in distinctive cultures in North America by replacing it with the idea that those peoples were waiting for a foreign (European) nation to assert sovereignty over them.

<sup>34</sup> “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1992) 17 Queen’s LJ 350.

<sup>35</sup> *Delgamuukw v BC*, [1991] 5 CNLR 1 (BCSC) [*Delgamuukw* (BCSC)].

<sup>36</sup> *Van der Peet* (SCC), *supra* note 1 at para 42.

<sup>37</sup> Walters, *supra* note 34 at 412.

<sup>38</sup> Granted, much of Walters’ commentary deals with Chief Justice McEachern’s dismissal of Gitksan and Wet’suwet’en claims to self-government and sovereignty, and the “continuity of law model,” but the passage in question is more inline with Lamer’s points regarding the precepts of liberal enlightenment and the Aboriginal perspective, and so, as a result, the sovereignty of the Crown is not of import.

Eurocentric thought discussed earlier (and even, again, the Hobbesian state of nature)? As does it not imply that Eurocentric culture, like “Culture,” is really “*acultural*” in the sense that the “culture” of Euro-Canadians is different from the “culture” of Indigenous peoples that leaves them, but not “us,” shackled by tradition.<sup>39</sup> Moreover, does not the reconciliation of Aboriginal cultures with the sovereignty of the Crown imply that Aboriginal peoples were not sovereign groups; and, in turn, would not this further insinuate that Aboriginal peoples were not living in organized societies?<sup>40</sup> Either option, though, is fallacious and reifies the legal hierarchy which subsumes Aboriginal legal systems to the common law and the subjectification of Aboriginal peoples to the sovereign Crown.<sup>41</sup>

Yet, if we cannot define Aboriginal rights on the basis of the philosophical precepts of the liberal enlightenment<sup>42</sup> and that the Aboriginal perspective must be taken into account, why are Aboriginal conceptions of social organization not part of the definition of reconciliation (and would, perhaps, may help redress a little of the hierarchy of legal systems)? Further, does not “translating” the Aboriginal perspective, or making it “cognizable,”<sup>43</sup> to the Canadian legal and constitutional structure *contradict* Chief Justice Lamer’s rejection of liberal enlightenment precepts? Finally, if the goal of s. 35(1) is reconciling Aboriginal peoples’ prior occupation with the sovereignty of the Crown, on what basis does the Court justify “contact” with Europeans as the cut off point for determining rights? It is not the reconciliation of Aboriginal cultures with Eurocentric cultures (which would be the only instance when the “contact” standard would remotely be appropriate). But by taking pre-contact as the standard for Aboriginal rights, Lamer

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<sup>39</sup> See e.g. Tim Ingold, “The Art of Translation in a Continuous World” in Gísli Pálsson, ed, *Beyond Boundaries: Understanding, Translation, and Anthropological Discourse* (Oxford: Berg, 1993) 210 at 212.

<sup>40</sup> I will discuss further issues regarding this in the final section of this thesis.

<sup>41</sup> See e.g. Michael Asch & Catherine Bell, “Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*” (1994) 19 Queen’s LJ 503 at 520.

<sup>42</sup> *Van der Peet* (SCC), *supra* note 1 at para 19.

<sup>43</sup> *Ibid* at para 49.

reveals his conflation of sovereignty with, in his words, “European society,”<sup>44</sup> and provides yet another example of how the Court’s categorical thought is inherently Eurocentrically biased. Again, then, the idea of “sovereignty,” in a way similar to the language in chapter 2, highlights some of the issues with not only the Court’s conception, but the problems of anchoring Aboriginal rights in the Eurocentric concept of culture as well. Moreover, seeing as Justice Bastarache included legal systems in his discussion of what is included in “way of life,”<sup>45</sup> does this not, *contra* anthropologist Michael Asch above, place politics in the realm of culture as I have argued? Even Asch, in his list of some of the aspects of the accepted definition of culture in anthropology, includes rules that govern “virtually all aspects of human social life.”<sup>46</sup> The problem as even Asch has pointed out<sup>47</sup> is not that the way the Court approaches Aboriginal rights sidesteps “political” aspects, but the fact that culture is the focus and key to the judicial tests to determine the rights of Aboriginal peoples.

The solution to the problem of using Eurocentric epistemologies and ontologies as the method for analysing Aboriginal rights lies, in part, by reorienting Aboriginal rights *back* to the situation that the doctrine of Aboriginal rights issues from: the “simple fact” of the prior occupation of Aboriginal peoples. The relational approach, I offer, is a better method and a

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<sup>44</sup> For example, compare paras 60-61 in *Van der Peet*, *supra* note 1:

The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America.

<sup>45</sup> *R v Sappier; R v Gray*, [2006] 2 SCR 686 at para 45 [*Sappier*].

<sup>46</sup> Asch & Bell, *supra* note 41 at 508.

<sup>47</sup> See e.g. “Judicial Conceptualization”, *supra* note 28 at 120.

means to avoid “culture” in the formulation of Aboriginal rights as it focuses on peoples’ lives and engagement with the land and the beings—both human and non-human—that dwell therein.<sup>48</sup> By doing so, I argue that the relational approach offers a means of avoiding most if not all of the problems identified here that the Court’s approach creates. At the same time, the relational approach will allow us to retain the idea of “way of life,” but in a manner that differs from Justice Bastarache’s conception.

## **II. “Culture”: the unshakable core of Aboriginal rights**

But first, given that one of my main criticisms of the Court’s approach to Aboriginal rights in this thesis is that it is lifeless, some (including some law journal editors) hold up *R. v. Sappier*; *R. v. Gray* as significant. This is because *Sappier* is presented as a watershed moment in the Court’s approach to “culture”:<sup>49</sup> after acknowledging that “the concept of culture is itself inherently cultural,” Bastarache J. goes on to define it as meaning “an inquiry into the pre-contact way of life of a particular aboriginal community.”<sup>50</sup> This includes the community’s pre-contact means of survival, methods of socialization, and legal systems, among others.<sup>51</sup> Yet Bastarache’s list of what “way of life” comprises reproduces the Court’s categorical thought as it remains bucket-like: filled with, or to be filled with, atomized traits (objectified practices, customs and

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<sup>48</sup> See e.g. Tim Ingold, *The Perception of the Environment: Essays in livelihood, dwelling and skill* (London: Routledge, 2000) at 133 [Ingold, *Perception*].

<sup>49</sup> See e.g. Dwight G Newman, “You Still Know Nothin’ ‘Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights” (2007) 52 McGill LJ 725 (“Notably, in its 2006 decision in *R. v. Sappier*, the Court implicitly moved away from elements of the majority analysis in *Van der Peet*—the leading case on the nature of Aboriginal rights—and toward the adoption of elements of the *Van der Peet* dissents” at 732); Constance MacIntosh, “From Judging Culture to Taxing ‘Indians’: Tracing the Legal Discourse of the “Indian Mode of Life”” (2009) 47 Osgoode Hall LJ 399 (“Although he did not overrule the *Van der Peet* test, Justice Bastarache’s comments do present a potential turning point for how Aboriginal culture is understood in section 35(1) engagements” at 402). See also Guy Charlton, “Letting go of Culture: A Comment on *R. v. Sappier*; *R. v. Gray*” (2007-2008) 39 Ottawa L Rev 317; John P McEvoy, “Aboriginal Activities and Aboriginal Rights: A Comment on *R. v. Sappier*; *R. v. Gray*” (2007) 6:2 Indigenous LJ 1 at 3, 16 & 20; Constance MacIntosh, “Developments in Aboriginal Law: The 2006-2007 Term” (2007) 38 Sup Ct L Rev (2d) 1 at 25, 32-33.

<sup>50</sup> *Sappier*, *supra* note 45 at paras 44-45.

<sup>51</sup> *Ibid* at para 45.

traditions). Thus, Bastarache’s “way of life” reproduces the intellectual foundations of the Court’s “culture.” For example, “means of survival” resonates with the Stewardian “culture core” discussed in chapter 2,<sup>52</sup> as, particularly in the contexts of *Sappier*, this refers to subsistence methods and practices that support the pursuit of surviving (or being alive). Moreover, Bastarache’s definition resonates with Sir E.B. Tylor’s foundational (even today), unilinear definition in anthropology: “Culture or Civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any capabilities and habits acquired by man as a member of society.”<sup>53</sup> Bastarache also acknowledged, possibly as a tip of the hat to the Aboriginal perspective, that “the term ‘culture’ as it is used in the English language may not find a perfect parallel in certain aboriginal languages,”<sup>54</sup> yet he used “way of life” in an attempt to clarify and expand the idea of “culture”—*not* to reject it. Therefore, “way of life” is really just a lexical substitution that does little to alter the Court’s approach, as the notion still focuses on, and is reliant upon, lifeless, objectified practices, customs and traditions.

Moreover, the belief that “way of life” replaced “culture” in the Court’s reasoning is a chimera: not only does Bastarache J. continue to use “culture” afterwards in *Sappier*, he uses the two terms interchangeably: “In the present cases, the practice of harvesting wood for domestic uses including shelter, transportation, fuel and tools is directly related to the way of life I have just described. ... I therefore conclude that the practice of harvesting wood for domestic uses was

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<sup>52</sup> See text accompanying note 179 in chapter 2.

<sup>53</sup> Sir Edward B Tylor, *Primitive Culture: Researches Into the Development of Mythology, Philosophy, Religion, Art & Custom* (London: John Murray, 1871) at 1.

<sup>54</sup> *Sappier*, *supra* note 45 at para 44 [emphasis added]. I would add that it is more than just how “it is used in the English language,” but even the *existence* of a notion like it in other Indigenous languages is rare—at least prior to European influence.



integral to the pre-contact distinctive culture of both the Maliseet and Mi'kmaq peoples.”<sup>55</sup>

Bastarache did not arrive at the phrase “way of life” *ex nihilo* either. In fact, in almost every Aboriginal rights rulings I looked at, this phrase, or the related notions of “manner/mode of life” and “lifestyle,” can be found.<sup>56</sup> In particular, Justice La Forest used the notion in his reasons in *Delgamuukw v. British Columbia* (SCC) where he wrote,

As already mentioned, when dealing with a claim of “aboriginal title”, the court will focus on the occupation and use of the land as part of the aboriginal society’s *traditional way of life*. In pragmatic terms, this means looking at the manner in which the society used the land *to live*, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites etc.<sup>57</sup>

While La Forest was writing in the contexts of Aboriginal title, which may possibly amplify parallels with the Stewardian culture core, his “pragmatic terms” are *very* similar to what Bastarache held, almost a decade later, when he outlined what is meant by “culture.”

That the supposed shift in thinking by the Court is not much of one is also illustrated by the distinctive standard in the contexts of an Aboriginal right to sovereignty. As alluded to in chapter 3, Chilwen Cheng has argued that it would be difficult to persuade the Court that a particular peoples’ conception of sovereignty is distinctive.<sup>58</sup> Though writing before *Sappier*, Cheng’s point still raises the question that, within the Court’s current approach to and framing of Aboriginal rights, if a claim to an Aboriginal right to sovereignty was made (if at all possible), would “sovereignty” be considered a practice, custom or tradition? Put differently, can

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<sup>55</sup> *Ibid* at paras 46-47. In this passage we can also see that the *Van der Peet* test still remains unaltered by the “way of life” notion.

<sup>56</sup> Even in *Baker Lake (Hamlet of) v Minister of Indian and Northern Development* ([1980] 1 FC 518). Perhaps of interest, in light of my argument—particularly in terms of the construction of Aboriginal “culture(s)” —is Justice Wallace’s point in his concurring opinion in *Delgamuukw v The Queen* (BCCA) ([1993] 5 WWR 97 [Delgamuukw (BCCA)]), where he wrote, “In this case, in the pre-sovereignty period, the ancestors of the native claimants were members of an organized society which had regulated its affairs over an extended period of time—a sufficient period of time to constitute, *from a European point of view*, a ‘traditional way of life’.” At para 382 [emphasis added].

<sup>57</sup> [1997] 3 SCR 1010 at para 194 (SCC) at para 194 [emphasis in original] [Delgamuukw (SCC)].

<sup>58</sup> Chilwin Chienhan Cheng, “Touring the Museum: A Comment on *R. v. Van der Peet*” (1997) 55 UT Fac L Rev 419 at 431-32.

“sovereignty” be objectified? Perhaps Justice Bastarache’s inclusion of legal systems as part of what is meant by “culture” provides an avenue for the assertion of sovereignty. Yet given that sovereignty is a relational concept, in a more standard sense of involving a relational structure between human persons,<sup>59</sup> it is possibly more difficult to invert and objectify.

Legal systems and practices, in Justice Bastarache’s formulation, are just one element of Aboriginal cultural wholes. This is in contrast to Eurocentric legal traditions which are, as I have argued, believed to be relatively autonomous from society and culture and is, therefore, objective:<sup>60</sup> as McLachlin J. wrote in her criticism of the *Van der Peet* test and, in particular, the concepts of distinctiveness, specificity and centrality, “To use such concepts as the markers of legal rights is to permit the determination of rights to be *coloured by the subjective views of the decision-maker rather than objective norms*, and to invite uncertainty and dispute.”<sup>61</sup> What we see, then, is that on the one hand the common law is held to be distinct and if not completely objective in its approach it is an aspiration;<sup>62</sup> on the other hand, Aboriginal legal systems are intertwined with the culture that produce them. This reflects a similar hierarchical view to those unilineal hierarchies of evolution, where Indigenous peoples are relatively “unsegmented” (lack “complexity”), and have “customary law” which is seen as inferior and antecedent to Eurocentric law.<sup>63</sup> As a result, Aboriginal law is “cultural,” while the common law is “acultural.” Again we see the two Great Divides at work via the ascendancy of rationality. And similar to ideas like the Laws of Nature, it is believed that there are laws, standards, and “facts” that exist outside of

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<sup>59</sup> For example, Anghie asserts that “[c]olonialism cannot be accounted for as an example of the application of sovereignty; rather, sovereignty was constituted and shaped through colonialism.” *Supra* note 16 at 6.

<sup>60</sup> See e.g. Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) at 7-8, 37; Henderson, *First Nations Jurisprudence*, *supra* note 4 at 191-92; Anghie, *supra* note 16 at 66-68.

<sup>61</sup> *Van der Peet* (SCC), *supra* note 1 at para 257 [emphasis added].

<sup>62</sup> See e.g. John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 7 [Borrows, *Indigenous Constitution*]; Henderson, *First Nations Jurisprudence*, *supra* note 4 at 191.

<sup>63</sup> See e.g. Borrows, *Indigenous Constitution*, *supra* note 62 at 12.

human society and culture, which are able to be objectively known to the detached, rational observer.<sup>64</sup>

Likewise, the Great Divides convert “sovereignty” into difference and pushes it to the boundary between “Us” and “Them.”<sup>65</sup> Thus, “sovereignty” continues the role nineteenth century jurists gave to it (and “society” and “culture”): to separate, and maintain the separation, between the so-called “civilized” and the “uncivilized.”<sup>66</sup> Yet as Sákéj Henderson has pointed out, the purpose of s. 35(1) is reconciliation and, as a result, the *Constitution* created a “shared sovereignty” that generates convergence instead of a hierarchical juxtaposition of (Eurocentric) sovereignty over Aboriginal peoples, their rights and their land.<sup>67</sup> I will discuss these notions of shared sovereignty and convergence further below in section five, but given their constitutionality, this would suggest that the trans-systemic framework I propose there is more in line with s. 35(1) and the doctrine of Aboriginal rights as the notions are components and products of it.

### **III. Aboriginal Rights-in-the-World**

Possibly the one time the Court should have looked at a dictionary, though, is when Justice Bastarache attempted to clarify and refine the Court’s use of the concept of culture to mean

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<sup>64</sup> The Court’s approach to ethnographic and oral history evidence illustrates this as well. For example, in *Tsilhqot’in Nation v British Columbia*, [2008] 1 CNLR 112 at para 137 (see too para 1360) [*Tsilhqot’in*]:

Many of the oral histories and oral traditions I was privileged to hear in this case were woven with history, legend, politics and moral obligations. ... Courts generally receive and evaluate evidence in a positivist or scientific manner: a proposition or claim is either supported or refuted by factual evidence, with the aim of determining an objective truth. However, in cases such as this, the “truth” which lies at the heart of the oral history and oral tradition evidence can be much more elusive.

<sup>65</sup> See discussion in chapters 2 and 3 regarding “Us” versus “Them” and how “difference” becomes a property of the boundary between the two.

<sup>66</sup> See e.g. Anghie, *supra* note 16 at 32 in particular.

<sup>67</sup> Henderson, *First Nations Jurisprudence*, *supra* note 4 at 87.

looking at pre-contact ways of life,<sup>68</sup> as the entry for “way” in the *Oxford English Dictionary* (2d ed) provides some interesting insights. While “way of life” does appear in the entry for “way,” of more use is the sense of “way” that way of life appears in: a course of life or action. In what follows I intend to show that by focusing on peoples’ lives as endlessly adapting to situations we can design a more equitable trans-systemic framework for Aboriginal rights.

First, though, an introduction to the relational approach: this Eurocentric anthropological perspective is based on Martin Heidegger’s phenomenological notion of “dwelling” or *Dasein* (“being-in-the-world”).<sup>69</sup> As anthropologist Tim Ingold, who this approach originated from, has suggested, this “dwelling” is more in the sense of “inhabiting”: instead of occupying a world, and a particular place therein, that is already built or prepared in advance of people that arrive to live there, the world is inhabited in the sense of both it and the people who live there are considered as part of a process of continually coming into being, each contributing to the other. In other words, dwelling/inhabiting is the active engagement of individuals with the constituents of their surroundings *in* the world that is ongoing, continually producing oneself and the world around them.<sup>70</sup>

Dwelling/inhabiting can be illustrated through the difference between a house and a home.<sup>71</sup> A house is a building that is a feature of the physical world that is first constructed prior to people moving in. A home, on the other hand, is more than just a building that people live

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<sup>68</sup> Sappier, *supra* note 45 at para 45.

<sup>69</sup> Ingold, *Perception*, *supra* note 48 at 185.

<sup>70</sup> See e.g. *ibid* at 5, 153, *Lines: A Brief History* (New York: Routledge, 2007) at 81 [Ingold, *Lines*], “Bindings against Boundaries: Entanglements of Life in an Open World” (2008) 40 *Environment & Planning A* 1796 at 1797, 1801-02 [Ingold, “Bindings”]. More recently, Ingold has preferred to use “habitation” over “dwelling,” but for our current concerns I will use inhabiting and dwelling as the same basic process. See e.g. Tim Ingold, *Being Alive: Essays on Movement, Knowledge and Description* (New York: Routledge, 2011) at 12-13 [Ingold, *Being Alive*], “Bindings”, *supra* at 1808, n 11, “Epilogue: Towards a Politics of Dwelling” (2005) 3 *Conservation and Society* 501 at 502-03.

<sup>71</sup> Tim Ingold, “Against the Motion (1): Human worlds are culturally constructed” in Tim Ingold, ed, *Key Debates in Anthropology* (London: Routledge, 1996) 112 at 116.

inside, a house becomes a home through the incorporation of the features of a house “into a characteristic pattern of day-to-day activities”: “Thus it is the very engagement of persons with the objects of their domestic surroundings, in the course of their life activities, that turns the house into a home.”<sup>72</sup> And because the lives of its inhabitants are ever changing/evolving, so too does the home: “It is, if you will, a kind of monument to their endeavours, though with the proviso that it is never complete.”<sup>73</sup> Again, then, life, the world and its constituents are part of a relational process that interweaves and binds them together into a meshwork. Through being alive, people grow along with the world and the things that surround them: rivers change course, forests expand and recede, children grow into adults, and strange foreigners arrive—but life continues unfolding and enfolding. Thus, through inhabiting one responds to and alters the world around them (a world that is constantly changing). And it is this reciprocal unfolding and enfolding that cultural pragmatics refers to.

The essence of “dwelling,” then, is that it is not simply living in a place that is pre-formed and only subsequently superficially modified. It is a process of inhabitation: of generation and regeneration, unfolding and enfolding. Nothing is constant, nothing is passed on. But what happens is that people *grow*—they learn, move about etc. as part of being *alive*—in situations structured by both their predecessors and those, including the world, around them.<sup>74</sup> And *this* is how continuity is established and maintained: through the overlapping of lives where predecessors shape and structure the contexts and situations of the contemporary who, in turn, do

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> Ingold has referred to this process of learning in structured contexts as “guided rediscovery.” See e.g. *Being Alive*, *supra* note 70 at 162, “Three in one: How an ecological approach can obviate the distinctions between body, mind and culture” in Andreas Roepstorff, Nils Bubandt & Kalevi Kull, eds, *Imagining Nature: Practices of Cosmology and Identity* (Aarhus: Aarhus University Press, 2003) 40; Tim Ingold & Terhi Kurttila, “Perceiving the Environment in Finnish Lapland” (2000) 6 *Body & Society* 183 at 193.

the same for their successors.<sup>75</sup> As Ingold writes, “There is nothing strange about this idea; on the contrary it sums up the process we are used to calling history.”<sup>76</sup> This movement of history, though, is not in the sense of the human production of society and culture, it is a process, like what happens in “nature,” of ontogenetic development.<sup>77</sup>

By focusing on dwelling/inhabiting then, the relational approach provides an alternative way of understanding humans based on our engagement with and in the world.<sup>78</sup> No longer is the human person bisected as though it was in part genetically predetermined and in part molded through the transmission of ready-made structures (as in the genealogical model), but instead is considered to grow or develop as a unified being in a world structured by the presence and activities of others.<sup>79</sup> As a result, both cultural knowledge and bodily substance undergo continuous generation in the contexts of peoples’ dwelling, and skills, habits, and so on become *enfolded* into the person.<sup>80</sup> In other words, the person “is conceived not as a substantive entity, but rather as a locus of growth within a field of relationships.”<sup>81</sup> Knowledge, as conceived through the relational approach, is continually generated and regenerated through one’s engagement in the world, instead of being acquired as a context-independent body of information like pouring water from one bucket to another.<sup>82</sup> Moreover, by not separating “nature” from

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<sup>75</sup> See e.g. Tim Ingold, “From complementarity to obviation: on dissolving the boundaries between social and biological anthropology, archaeology and psychology” (1998) 123 *Zeitschrift für Ethnologie* 21 at 31 [Ingold, “From complementarity”].

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Tim Ingold, “The Evolution of Society” in AC Fabian, ed, *Evolution: Society, Science and the Universe* (Cambridge: Cambridge University Press, 1998) 79 at 94.

<sup>79</sup> See e.g. Ingold, “From complementarity”, *supra* note 75 at 26.

<sup>80</sup> See e.g. Ingold, *Perception*, *supra* note 48 at 133, “From complementarity”, *supra* note 75/79 at 26.

<sup>81</sup> Ingold & Kurttila, *supra* note 74 at 194.

<sup>82</sup> To just remind the reader: in the genealogical model, relations between animate beings are thought of as resting on the belief that every such being is specified—in its “essential nature”—prior to starting its life in the world. Ingold, *Perception*, *supra* note 48 at 108. Thus, “culture” becomes superorganic, separate from people, and learning becomes viewed as a process of enculturation in which a corpus of knowledge, representing a collection of information—“culture”—is transmitted generation to generation which is then applied or expressed in an individual’s activities. In other words, the acquisition of knowledge is independent from the practicalities of its use.

“culture,” practices, customs, traditions, “culture” and even documents<sup>83</sup> are enfolded into this process of ontogenetic development. Again, *everything* grows along with human beings through their mutual engagements.

By viewing the human person as being situated in a meshwork of relationships, life and “ways of life” are continuously and endlessly coming into being, and people moving through and in the world creates an interweaving of lives, experiences and the world—much like the surface of a basket.<sup>84</sup> As a result, adopting the relational approach still allows us to use the *heuristic*, as discussed earlier (and more below), of “culture,” but instead of it being conceived as a noun, it is considered as a verb or process.<sup>85</sup> “It might be more realistic, then,” suggests Ingold, “to say that people *live culturally* rather than that they *live in cultures*.”<sup>86</sup> This then alters how “tradition” and “continuity” are conceived.

To provide a first illustration of how the relational approach differs from the Eurocentric, genealogical model is an example from my doctoral research: during my visits to the Puget Sound region of Washington State to do fieldwork, I kept coming up against the issue of when is a change “change,” or how much difference does it take to be “different.” The struggle I was having reflects anthropologist Wayne Suttles’ point about his discussion of the potlatch complex among the Kwakwaka’wakw (Kwakiutl) peoples where he had tried to show the potlatch complex in its traditional setting, but found that “that setting has been changing. Practices that

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*Ibid* at 137-38. In this overview of the genealogical model we can see aspects of the Court’s approach discussed in Part I, such as “culture” as an inventory of elements or corpus of information. Likewise, Chief Justice Lamer’s use of a dictionary definition of “tradition” to justify his grounding of Aboriginal rights in pre-existing/-contact societies parallels the above view of learning as enculturation. *Van der Peet* (SCC), *supra* note 1 at para 40. “Culture” as being expressed through one’s activities is similarly materialist to the Court which then also facilitates the dispositionalization of objectified practices, customs and traditions.

<sup>83</sup> As discussed in chapter 1.

<sup>84</sup> See e.g. Ingold, *Lines*, *supra* note 70 at 80-82, “Making Culture and Weaving the World” in PM Graves-Brown, ed, *Matter, Materiality and Modern Culture* (London: Routledge, 2000) 50 at 69 [Ingold, “Making Culture”].

<sup>85</sup> See e.g. Nigel Rapport & Joanna Overing, *Social and Cultural Anthropology: The Key Concepts*, 2d ed (London: Routledge, 2007) at 114-15.

<sup>86</sup> “Introduction to Culture” in Tim Ingold, ed, *Companion Encyclopedia of Anthropology* (New York: Routledge, 1998) 329 at 330 [emphasis in original].

might be called traditional in the 1990s were innovations in the 1890s.”<sup>87</sup> From the perspective afforded by the genealogical model, this dilemma of when is change, “change” makes no sense: as discussed in the last chapter, there is change or there is continuity.<sup>88</sup> This results in the Court, via the doctrine of “evolution through time”—whether discontinuous or “logically”—as having the task of not only deciding what aspects of Aboriginal claimants’ culture gets s. 35(1) protection, but also places them in a position of dominance and control whereby they are able to sit in judgment and determine just how much claimants can “change” and still be faithful to the Court’s construction of evidence about the “authentic” culture of their ancestors.

In contrast to the genealogical model, I proposed the notion of cultural pragmatics that I based on the relational approach and defined as the unfolding and enfolding of relationships in our practical engagement with and in the world.<sup>89</sup> By approaching culture and cultural dynamics thusly we are afforded a more nuanced view and understanding. While I do not deny that what we could refer to as “contemporary traditional” Aboriginal peoples and their cultures differ from particularly their pre-contact ancestors, as it would be absurd to argue that they are the same; *but* such a concession is only necessary if we remain within the assumptions of the genealogical

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<sup>87</sup> “Streams of Property, Armor of Wealth: The Traditional Kwakiutl Potlatch” in Aldona Jonaitis, ed, *Chiefly Feasts: The Enduring Kwakiutl Potlatch* (New York: American Museum of Natural History, 1991) 71 at 133.

<sup>88</sup> Granted, as discussed in the last chapter, the Court has suggested that the idea of continuity as providing the necessary flexibility to avoid a frozen approach, but I hope that I showed there how such an assertion makes no sense. Moreover, as I have been trying to partly encapsulate with my use of “ontogenetic development,” human persons (as well as all living beings) live in biological time—not in cosmological or historical time. In the Eurocentric life and earth sciences, with the principle of the mutability of types, there is, in the history of the earth and of life on it, no permanent typology of natural kinds—whether those kinds of being are living or lifeless. The typologies they construct, though, are historical: their contents change, albeit discontinuously in time. The types of being and life change. Change also changes: the ways in which things are transformed into other things is itself subject to those transformations. Further, the notion of cultural pragmatics also holds that being “continuous” results in change. This transformation of transformation, and the experience of it, is what defines time. See generally Gregory Bateson, *Mind and Nature: A Necessary Unity* (Cresskill, NJ: Hampton Press, 2002) ch 2, *Steps to an Ecology of Mind* (Chicago: University of Chicago Press, 2000) at 338-39, 454-71.

<sup>89</sup> Mark Ebert, *To A Different Canoe: A Study of Cultural Pragmatics and Continuity* (PhD Thesis, University of Aberdeen, 2006) at 6-8 [unpublished] [Ebert, *To A Different Canoe*].



model as the notion of “change” is formulated as *discontinuity*.<sup>90</sup> Viewed through the relational approach, though, these are *differences of degree and not kind*,<sup>91</sup> and are based on a dynamic, responsive, and relational engagement in the world that is framed within the contexts structured by predecessors.<sup>92</sup> None of the ancestors of contemporary Aboriginal peoples could have predicted the challenges faced today, and as pointed out towards the end of the last chapter, by reifying the supposed “shackles” of tradition, the Court impedes even the potential for Aboriginal peoples’ to behave “authentically” and survive as communities with their distinctive cultures.<sup>93</sup> As my beloved, late cultural great-great-grandmother once told me: “If you can’t adapt you’re dead.... And so my people are flexible. They know that they need to be adaptable—they need to be flexible in order to live.”

Yet because their *lived* culture is not bounded, rigid or static, the “traditional” (pre-contact) cultures of Aboriginal peoples still resonates today. “Continuity” from the relational approach, then, lies in the flexibility and adaptability of *all* peoples, not just Indigenous peoples, as they dwell and relate in the world. Instead of the problematic relationship between change and continuity that arises from the removal of peoples’ existence in the world in the genealogical model, cultural pragmatics approaches cultural dynamics from the perspective that the lives, and practices etc. of a people continually adjusts to the cultural, social, political, and environmental contexts in which they find themselves. As a result, the genealogical model’s problem of

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<sup>90</sup> As we saw in my discussion in chapter 4 of how the Court determines/approaches change and continuity in the contexts of the “logical evolution” of trade.

<sup>91</sup> A difference in kind, in this context, would represent evidence of assimilation—at least in the genealogical model. From the perspective afforded by the relational approach and cultural pragmatics, the notion of “assimilation” makes no sense as it depends on a conception of culture as being bounded.

<sup>92</sup> *Ibid* at 32.

<sup>93</sup> Douglas Deur, “The Hunt for Identity: On the Contested Targets of Makah Whaling” in Jim Norwine & Jonathan M Smith, eds, *Worldview Flux: Perplexed Values among Postmodern Peoples* (New York: Lexington Books, 2000) 145 at 170. Similarly, Gloria Cranmer-Webster writes, “There is some criticism that contemporary potlatches are not like they were ‘in the old days.’ How could they be? The world we live in today is vastly different from that in which our grandparents lived.... If a culture is alive, it does not remain static. Ours is definitely alive and changes as the times require.” “From Colonization to Repatriation” in Gerald McMaster and Lee-Ann Martin, eds, *Indigena: Contemporary Native Perspectives* (Vancouver: Douglas & McIntyre, 1992) 25 at 36.

determining what is “changed” and what is “continuous” disappears; as the boundary between them simply dissolves.<sup>94</sup>

To illustrate how cultural pragmatics offers a different view from the formulation of continuity and change in the genealogical model let us turn to the “change” in house style in the Puget Sound region. With the expansion of Americans into the region, the Indigenous peoples were put under increased pressure to abandon their former, communal-style housing in favour of the settlers’ single family houses.<sup>95</sup> Coercion was applied based on the belief that this shift in house style would contribute to the “civilizing” of the First Peoples by breaking up kinship groupings into nuclear families.<sup>96</sup> Approaching this shift using the genealogical model, changes to the artifact (outside) of the house would be dispositionalized and taken as evidence of culture loss or assimilation. A problem would arise, though, if the uses (artifice) of the home are at all considered: as inside, the layout and usages of the house reflected traditional practices.<sup>97</sup> In other words, if the artifice of the houses is at all paid attention to, the perspective afforded by the genealogical model runs into a conflict between the inside and the outside: as the architecture was the American-style housing, but the “pre-contact” organization and uses continued.<sup>98</sup>

Adopting the relational approach and cultural pragmatics, on the other hand, these houses are considered as both artifact and artifice—if the two can be separated at all<sup>99</sup>—and so American-style houses do represent “assimilation,” not in the sense of acculturation though, but in the reverse direction: these houses were assimilated into continuing “pre-contact” practices

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<sup>94</sup> Ebert, *To A Different Canoe*, *supra* note 89 at 24.

<sup>95</sup> *Ibid* at 135.

<sup>96</sup> Wayne Suttles, “Post-Contact Culture Change Among The Lummi Indians” (1954) 18 *British Columbia Historical Quarterly* 29 at 59.

<sup>97</sup> Ebert, *To A Different Canoe*, *supra* note 89 at 136.

<sup>98</sup> *Ibid* at 136-37.

<sup>99</sup> I question whether they can be separated at all as the distinction of artifact and artifice is one between objects and knowledge—a distinction that is a product of Eurocentric thought. Viewed via the relational approach, knowledge and objects are not distinct but one and the same. *Ibid* at 62.

that are part of the ongoing practical unfolding and enfolding of relationships in the world.<sup>100</sup> In other words, as part of cultural pragmatics. In contrast, then, to Chief Justice Lamer's implicit definition of continuity via his definition of tradition,<sup>101</sup> "continuity" from the relational approach is thought of as part of a process of ontogenetic development. This conception of continuity resonates with both my proposed conception of "way of life" and the view of culture as a verb. Such an approach does not, at the same time, prevent discussions of "change," but now it is formulated through juxtaposing snapshots taken during the continuing unfolding and enfolding of lives and relationships, instead of a process in which something becomes different.<sup>102</sup>

Therefore, the relational approach restores emphasis onto the "one simple fact" of prior occupation and would base Aboriginal rights on the fluid continuity of cultural pragmatics rather than dispositionalized, bounded, objectified practices, customs and traditions. Further, the infringement aspect of the test in *R. v. Sparrow*<sup>103</sup> could be adapted, if it needs to be at all, to enfold into it government policies that removed Aboriginal peoples or prevented their access to their pre-contact territories, and thereby address Chief Justice Lamer's "unbroken chain" issue.

So while cultural pragmatics allows one to still talk about change, *it is important to remember that the snapshots are arbitrary selections in a continuous process of ontogenetic development*. Thus, even though people today are doing things differently when compared with how it was done sometime in the past, this does *not* signify discontinuity.<sup>104</sup> Nor is any snapshot given primacy, as Eurocentric tunnel history does, as there is no justification to do so. To give

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<sup>100</sup> *Ibid* at 137.

<sup>101</sup> *Van der Peet* (SCC), *supra* note 1 at para 40.

<sup>102</sup> "Change is simply what we observe if we sample a continuous process at a number of fixed points, separated in time. The growth of an organism, for example, is continuous, but if we compare its appearance at different times it will appear to have changed." Ingold, *Perception*, *supra* note 48 at 147.

<sup>103</sup> [1990] 1 SCR 1075 [*Sparrow*].

<sup>104</sup> See e.g. Ingold, *Perception*, *supra* note 48 at 147.

primacy to European contact or the assertion of sovereignty is ethnocentric and, as shown, is based on a belief in a static pre-contact life and the fallacy of European superiority. As a result, the Court would no longer have to hypothesize, from a perspective afforded by the supposed disengagement or objectivity that rationality is believed to give, about how Aboriginal peoples and their cultures would have (*logically*) evolved without, it seems, the presence of Europeans.<sup>105</sup> This is an abstraction and a fiction that is not possible with the relational approach as it is based on an atomistic (and ethnocentric) conception of “culture” that is divorced from the lives of people.

The relational approach could also still allow the Court to focus on practices, customs, and traditions. Again, though, the approach to activities and behaviours would diverge from how they are conceived of in the genealogical model. To illustrate how the relational approach differs let us take the example of Ingold building himself a bookshelf.<sup>106</sup> One day he decided to make a bookshelf, which involved sawing a board to the correct length. Considered through the genealogical model, the act of sawing, as with the use of tools generally, is commonly understood as a discrete step in a series of steps that together comprise a plan for the assembly of a complete object.<sup>107</sup> Ingold points out, though, that sawing a board involves more than just one, isolated step and is, instead, more like walking: “these steps are no more discrete or discontinuous than those of a walker. That is to say, they do not follow one another in succession, like beads on a string. Their order is processional rather than successional.”<sup>108</sup>

Similar to each stride while walking, every stroke of the saw “is a development of the one before

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<sup>105</sup> That the doctrine of logical evolution implies fantasizing how Aboriginal peoples would have developed without European influence is shown by how the Court only considers such influence as significant in determining the authenticity of rights claims and the Aboriginal cultures of the claimants.

<sup>106</sup> “Walking the Plank: Meditations on a Process of Skill” in John R Dakers, ed, *Defining Technological Literacy: Towards an Epistemological Framework* (New York: Palgrave Macmillan, 2006) 65.

<sup>107</sup> *Ibid* at 67.

<sup>108</sup> *Ibid*.

and a preparation for the one following.”<sup>109</sup> Sawing, then, like going for a walk, is a journey; and both include recognizable phases that lend a “temporal shape” to the overall movement—but in neither are the phases sharply demarcated.<sup>110</sup>

Moreover, to consider something to be a tool is not, as the genealogical model would hold, a result of an object’s intrinsic attributes. Instead, describing an object as a tool is to situate it in relation to other things within a field of activity. “Indeed,” writes Ingold, “we tend to name our tools by the activities in which they are characteristically or normatively engaged, or by the effects they have in them.”<sup>111</sup> In other words, referring to an object as a saw is to situate it within the context of a story, and so to consider an object a tool results in the name of the object invoking its story: “the functions of things are not attributes but narratives. They are the stories we tell about them.”<sup>112</sup> Therefore, in opposition to the Court’s dispositionalized genealogical model, eating pizza, using a motorboat, selling salmon, etc.—while not “tools” *per se*—do not represent assimilation, but are part of a continuing narrative of cultural pragmatics. Put differently: instead of dispositionalizing “change” as inevitable assimilation, the incorporation of “European influences,” as mentioned above, is just one instance of cultural pragmatics that forms the innovative, unfolding narrative of a continuing people. This narrative simultaneously operates collectively and individually through the interweaving relations, families, and individuals. Each moment in the story is then one of ongoing activity and so the “things” stories tell of are not objects but topics which are identified by their relations with situations (the “things”) that led up to the moment and that will continue on.<sup>113</sup> “Relation,” here, is not understood atomistically as connections “between pre-located entities but as a path traced

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* at 71.

<sup>112</sup> *Ibid.*

<sup>113</sup> Ingold, *Lines*, *supra* note 70 at 90.

through the terrain of lived experience.”<sup>114</sup> In this way, stories and life are woven together in a relational meshwork of trails.<sup>115</sup> This returns us back to the sense of “way of life” I have proposed here that is based on movements and relationships in the world.

Continuing with Ingold’s bookshelf and his mediations on skill and practice, his overall point involves an enlarging of how we think of movements and activity through placing them in the contexts of ongoing practices in a field of relationships. Instead of dichotomizing peoples’ interactions in a world of nature with interactions with others in a world of culture, the relational approach situates individuals within this ongoing field of relationships that is continually generated and regenerated during our engagement in an undivided world. This fits well with Henderson’s point about Aboriginal jurisprudences: “In comprehending the continuity of First Nations jurisprudence, the judiciary needs to be particularly sensitive to the capacity of First Nations jurisprudence or activities to regenerate and to be exercised in a modern or evolving form.”<sup>116</sup> Likewise, cultural pragmatics resonates with Borrows’ point about how “the adoption of new practices, traditions and laws in response to new influences is always integral to the survival of any community in its relations with another.”<sup>117</sup> Because cultural pragmatics does not focus on form, the relational approach would place more weight on the continuation of the community and not on whether or not atomized elements of culture appear similar enough to be considered the same or a logically evolved “sameness.” This is because both form and meaning are continually emergent within the relational contexts of ongoing, situated practice. Continuity is then manifested by the processes and practices in which objectified practices, customs and

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<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *First Nations Jurisprudence*, *supra* note 4 at 215.

<sup>117</sup> “The Trickster: Integral to a Distinctive Culture” (1997) 8:2 *Const Forum Const* 27 at 32.

traditions, objects etc. are enfolded in to and *not* in isolation.<sup>118</sup> Similar to my point above regarding how the Court impedes Aboriginal peoples from being able to act “authentically,” it is by forcing Aboriginal peoples to replicate a pattern or objectified practice, custom or tradition fixed by Chief Justice Lamer’s definition of tradition (which is analogous to genealogical descent) that would actually rupture continuity, similar to a needle getting stuck in the groove of a record: “One could not keep the music going.”<sup>119</sup>

This line of reasoning may appear similar to the “social” form of description of Aboriginal rights proposed by British Columbia Justice of Appeal Lambert in *R. v. Vanderpeet*,<sup>120</sup> that Lamer C.J. rejected as casting “the aboriginal right in terms that are too broad.”<sup>121</sup> Lamer also rejected Lambert’s approach due to its failure to accord with the Court’s orthodox atomistic and materialistic point of view by adding that the social description frames Aboriginal rights “in a manner which distracts the court from what should be its main focus—the nature of the aboriginal community’s practices, customs or traditions themselves.”<sup>122</sup> My proposal differs from Lambert’s as he still maintains the focus on objectified practices, customs and traditions and their significance to the claimants’ atomized lives.<sup>123</sup> As a result, Lambert held that because fishing for salmon was a “*custom*” that defined the culture of the Stó:lō peoples, and, harkening back to Steward’s culture core, asserted that because it was a significant custom, salmon fishing “made possible the cycle of the lives of its members” that continues today.<sup>124</sup>

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<sup>118</sup> See e.g. Tim Ingold, “Foreword” in Marcia-Anne Dobres & Christopher R Hoffman, eds, *The Social Dynamics of Technology: Practice, Politics, and World Views* (Washington: Smithsonian Institution Press, 1999) vii at viii.

<sup>119</sup> Ingold, *Perception*, *supra* note 48 at 148.

<sup>120</sup> [1993] 5 WWR 459 at paras 140-65 (BCCA) [*Vanderpeet* (BCCA)].

<sup>121</sup> *Van der Peet* (SCC), *supra* note 1 at para 52. Though Justice L’Heureux-Dubé agreed with Lambert in her dissent. For example, *ibid* at para 161.

<sup>122</sup> *Ibid* at para 52.

<sup>123</sup> See, for example, *Vanderpeet* (BCCA), *supra* note 120 at para 140.

<sup>124</sup> *Ibid* at para 137.

Again, though, instead of focusing on the lives of Stó:lō peoples, which, like any peoples, are inherently distinctive, Lambert concentrates on objectified practices, customs and traditions.

But what if salmon are not available from overfishing, “conservation” or any of the other infringements by the Crown that can be justified under the *Sparrow* test? Are we then to believe that the Stó:lō, or their “culture,” are no longer distinctive if they are not able to fish for salmon? Although both *Pamajewon* and *Mitchell v. M.N.R.*<sup>125</sup> expanded the *Van der Peet* test to suggest that the means by which an Aboriginal peoples sustained their life prior to contact could be protected, Justice Bastarache, as mentioned earlier, ruled that “there is no such thing as an aboriginal right to sustenance,” because, it appears, that is too broad or abstract a characterization.<sup>126</sup> Bastarache does state, though, that these cases “stand for the proposition that the traditional *means* of sustenance, meaning the pre-contact practices relied upon for survival” *could* meet the standards of the *Van der Peet* test and establish an Aboriginal right.<sup>127</sup> Protecting the “traditional means” of survival still provides a lot of leeway to the Court that allows them to interpret the contemporary right and posits that those means will continue to be available into the

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<sup>125</sup> [2001] 1 SCR 911 [*Mitchell*].

<sup>126</sup> *Sappier*, *supra* note 45 at para 37. Compare this position with the “right to life” in the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) which has not been considered too broad or abstract a characterization to be legally enforceable. See e.g. *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 at 584-89, *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791 at paras 123-24. Is a right to sustenance, nourishment or livelihood really that broad and abstract or indeterminate for the courts? Are they more abstract than starvation, hunger or poverty? Is the notion of a right of sustenance not a fundamental human right of every person? Recent research has found that starting in the 1940s, government scientists deprived Aboriginal children in residential schools and in Aboriginal communities across Canada proper nourishment to study the effects of malnourishment without the subjects’ consent or knowledge. See Ian Mosby, “Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942-1952” (2013) 46:91 *Histoire sociale/Social History* 145. Surely the rights of the subjects were infringed or abrogated by these studies, and were not too broad or abstract. But which rights? Does not the way the Court has characterized Aboriginal fishing rights, in coastal British Columbia at least, through the enfoldment of governmental legislation and regulation represent a similar infringement? Given that Aboriginal peoples in British Columbia are only allotted 5% of the salmon harvest, and any Aboriginal rights to the fish can be infringed on the basis of conservation needs, limiting them to “traditional” fishing sites results in them bearing the brunt of “conservation” (contrary to the order of priorities in *Sparrow*). If an Aboriginal right to sustenance is too broad or abstract of a characterization, this approach to Aboriginal fishing rights by the Court (and the Crown) results in them *actually* becoming abstract: there is little use for an Aboriginal fishing right if Aboriginal peoples are not actually allowed to fish.

<sup>127</sup> *Sappier*, *supra* note 45 at para 37 [emphasis in original].



future as well. It also essentializes culture, yet again, as it presumes that the means is something that not only represents all participants in that culture, but that all participants, “traditionally,” took part, or were able to take part, in it. Bastarache’s position also seems to be in opposition to what the Court held in *Sparrow*: “it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.”<sup>128</sup>

Political scientist Avigail Eisenberg, though, has criticized the observation that culture is “largely relational” by arguing that it “does not help *at all* in resolving the problems of essentialism.”<sup>129</sup> “Rather,” she continues, “it raises the questions of whether relations ought to be ones of restriction or accommodation and how we ought to decide.”<sup>130</sup> This criticism by Eisenberg evinces atomism where relations between autonomous cultures are external and occur across their distinctive boundaries.<sup>131</sup> Therefore, culture-as-largely-relational is not the same as arguments based on the relational approach.

To illustrate how the relational approach differs, and does not invert people’s lives to a static, homogenous collection of a few “essences,” let us return to a conception of personhood as a locus of growth. Recall that in the Eurocentric genealogical model the person was considered to be animal plus, which atomized culture as a collection of elements of intergenerationally transmissible information. Enculturation, the learning of culture, then becomes a process of transmission that is conceived as the cultural analogue to the transmission

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<sup>128</sup> *Supra* note 103 at 1112.

<sup>129</sup> *Supra* note 28 at 43 [emphasis added]. I take the “essentialism” of culture to mean, as discussed previously (for example, in chapter 2), that a peoples’ “culture” can be reduced, inverted, dispositionalized and homogenized to a set of “essences” that are assumed to be the defining traits of a particular peoples *in perpetuity*. As I hope to have shown in earlier chapters, the search for integrality and distinctiveness by the Court through objectified practices, customs and traditions is an instance of an essentialist approach. Again, though, this is a problem inherent in the Eurocentric concept of “culture,” that is avoided by adopting the “enlivened” relational approach I am proposing here.

<sup>130</sup> *Ibid.*

<sup>131</sup> See e.g. Deborah Gordon, “Tenacious Assumptions in Western Medicine” in Margaret Lock & Deborah Gordon, eds, *Biomedicine Examined* (London: Kluwer Academic Publishers, 1988) 19 at 26.

of biological material along lines of descent.<sup>132</sup> The acquisition of cultural knowledge, again, is then divorced from the practicalities of its use.<sup>133</sup>

Yet, because the relational approach, as discussed earlier, does not divide the person along Cartesian lines, the person is conceived as a unified being that grows in a world structured by the presence and activities of others, and so skills, habits and knowledge become enfolded into the individual.<sup>134</sup> Knowledge, then, emerges through one's engagement in the world, and learning becomes a process of guided rediscovery in which the novice *grows*,<sup>135</sup> and knowledge and the world become interwoven through peoples' movements in the world.<sup>136</sup> Because nothing is transmitted to the novice, they develop, through a mixture of imitation and improvisation their own ways of doing things.<sup>137</sup> The growth of knowledge is part of the growth of the person during their involvement with the world and its inhabitants.<sup>138</sup> And because this learning occurs in a context that is structured by predecessors, experiences also become interwoven into patterns that are equivalent to what people are use to calling "culture."<sup>139</sup> "Culture," instead of lying "in some shadowy domain of symbolic meaning, hovering aloof from the 'hands on' business of practical life," is, from the relational approach, "in the very texture and pattern of the weave itself."<sup>140</sup>

In a sense culture, and Aboriginal rights, are like artifacts, *but* not in the sense of things that are *made*. Instead, the relational approach characterizes artifacts as things that grow.<sup>141</sup> The view that things are made is based on an assumption of a distinction between form and substance, or between the object's design specifications and the raw materials from which it is

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<sup>132</sup> Ingold, *Perception*, *supra* note 48 at 36, *Lines*, *supra* note 70 at 115.

<sup>133</sup> Ingold, *Perception*, *supra* note 48 at 137-38.

<sup>134</sup> Ingold, "From complementarity", *supra* note 75 at 26.

<sup>135</sup> Ingold, *Perception*, *supra* note 48 at 356.

<sup>136</sup> Ingold & Kurttila, *supra* note 74 at 186.

<sup>137</sup> *Ibid* at 193.

<sup>138</sup> Ingold, *Perception*, *supra* note 48 at 147.

<sup>139</sup> *Ibid* at 361.

<sup>140</sup> *Ibid*.

<sup>141</sup> See e.g. Ingold, "Making Culture", *supra* note 84 at 51.

composed.<sup>142</sup> From this perspective, similar to the materialism and dispositionism of the Court, objects are considered to be the embodiments of mental processes.<sup>143</sup> In contrast, living things, in this perspective, are supposed to have the information specifying their design carried in the materials of descent (genes), resulting in every new life cycle commencing with the injection of the specification into the physical medium that will become the organism.<sup>144</sup> “But with artefacts,” Ingold points out, “this relation between form and substance is inverted” in Eurocentric thought.<sup>145</sup> Instead of unfolding from within, the form of artifacts is applied externally. Yet this distinction between inside and outside “implies the existence of a *surface*, where solid substance meets the space of action of those forces that impinge upon it.”<sup>146</sup> The forms of artifacts, unlike that of organisms, are supposed to issue from within the human mind and making becomes a process of translation that mediates between the outer, material world and the inner world of the mind. In other words, through the action of making, form is imposed upon the surface of raw materials modifying them to suit cultural purposes.<sup>147</sup> This, so far probably seems fairly straightforward, and so it is common to separate making and growing. But what about the case of baskets? Surely they are artifacts, but if baskets are “made” where is the surface onto which the form of the basket is imposed upon?

In response to this dilemma posed by baskets, Ingold suggests that making should be understood as a modality of weaving, rather than the reverse view that the above Eurocentric

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<sup>142</sup> *Ibid.*

<sup>143</sup> See e.g. Mark Ebert, “The Resonance of Material Culture: Carving and Weaving the Past” (Paper delivered at the 60th Annual Northwest Anthropological Conference, Washington State University, 15 March 2007), [unpublished] [Ebert, “Resonance”]. See also Ingold, “Making Culture”, *supra* note 84, *Perception*, *supra* note 48 (in particular chapters 5, 18 and 19).

<sup>144</sup> Ingold, “Making Culture”, *supra* note 84 at 51.

<sup>145</sup> *Ibid.* Ingold refers to this as the “hylomorphic model of creation” that originated with Aristotle and became increasingly embedded in Eurocentric thought ever since. *Being Alive*, *supra* note 70 at 210.

<sup>146</sup> Ingold, “Making Culture”, *supra* note 84 at 51 [emphasis in original].

<sup>147</sup> Ebert, “Resonance”, *supra* note 143.

approach to artifacts implies.<sup>148</sup> Viewing making as a modality of weaving shifts the emphasis from treating an object as an expression of an idea (making) to regarding it as the embodiment of rhythmic movement (weaving): “to invert making and weaving is also to invert idea and movement, to see the movement as truly generative of the object rather than merely revelatory of an object that is already present, in an ideal, conceptual or virtual form, in advance of the process that discloses it.”<sup>149</sup> Therefore, “making” defines an activity in terms of its capacity to produce a certain object, removing the object from the contexts of the flux and flow of life that its production and use are part of; and results in it appearing as a static object of detached contemplation.<sup>150</sup> Thus, this view of making produces artifacts that are like the conception of culture “made” through the genealogical model! “Made” objects, like “culture,” are frozen because an object is considered to be “made” (finished) when it conforms to the mental image, and any subsequent alterations are considered to be part of its use—and *not* part of its production.<sup>151</sup> Further, by objectifying objects, the processes that created the finished object disappear or are hidden behind it, resulting in the view that the meaning of the object is located in the idea it expresses instead of the current of activity where it actually belongs.<sup>152</sup> In other words, the meaning of the object is dispositionalized much like objectified practices, customs and traditions are by the Court: neither are seen as responsive to the situation.

Returning to basket weaving: in opposition to the above portrayal of making an artifact, which implies the prior presence of a mental image and a surface to be transformed, with weaving, once the materials have been assembled nothing is done to their surfaces. Instead of altering the surface of the basket, as implied by “making,” its surface is built up during the

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<sup>148</sup> *Perception*, *supra* note 48 at 349.

<sup>149</sup> *Ibid* at 346.

<sup>150</sup> Ingold, “Making Culture”, *supra* note 84 at 64.

<sup>151</sup> See e.g. Ingold, *Perception*, *supra* note 48 at 199.

<sup>152</sup> Ingold, “Making Culture”, *supra* note 84 at 64.

process of weaving.<sup>153</sup> And although the weaver may start out with a fairly clear idea of what form they want the basket to be, the resulting form of the basket does not arise from the idea. Rather, its form emerges from repeating the aforementioned pattern of rhythmic movement.<sup>154</sup> The form of the basket, then, *grows* through “the mutual involvement of people and materials in an environment.”<sup>155</sup>

Elsewhere I adapted Ingold’s discussion of making and weaving to the revival of canoe carving in the Puget Sound region that occurred in the build up to the 1989 “Paddle to Seattle” Tribal Journeys that was part of the Washington State Centennial celebrations and the associated Native Canoe Project.<sup>156</sup> During a symposium on native canoes, participants heard presentations from active carvers and recognized specialists who shared their knowledge about constructing canoes and participants were able to experiment with the tools and techniques discussed in the presentations.<sup>157</sup> In this way, formal instruction was combined with “learning-in-practice,”<sup>158</sup> in which individuals learn through being shown what to do under the guidance of experienced practitioners resulting in novices growing in both knowledgeability and skill.<sup>159</sup> Further, some of the tribes still had examples of the “old-style” canoes which were used to recover carving knowledge by replicating the artifact.<sup>160</sup> This may appear to contradict some of my argument above by seeming to suggest that the canoes were “made,” but this is only possible by distinguishing the “design specifications of the object and the raw materials of which it is

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<sup>153</sup> *Ibid* at 55. Nor is there any direct correspondence between the surfaces of the fibres used and the surface of the basket. *Ibid*.

<sup>154</sup> *Ibid* at 57.

<sup>155</sup> *Ibid* at 68.

<sup>156</sup> Ebert, *To A Different Canoe*, *supra* note 89 at 190 ff.

<sup>157</sup> Leslie J Lincoln, *Paddle to Seattle: A Native Washington Movement to “Bring Them Canoes Back Home”* (MA Thesis, University of British Columbia, 1990) at 95-96, 101 [unpublished].

<sup>158</sup> See Jean Lave, “The culture of acquisition and the practice of understanding” in James W Stigler, Richard A Shweder & Gilbert Herdt, eds, *Cultural Psychology: Essays on Comparative Human Development* (Cambridge: Cambridge University Press, 1990) 309 at 310-11.

<sup>159</sup> See e.g. Ebert, *To A Different Canoe*, *supra* note 89 at 8-9, 191, Ingold, *Perception*, *supra* note 48 at 358-60.

<sup>160</sup> Lincoln, *supra* note 157 at 140.

composed.”<sup>161</sup> But because artifact and artifice are not separate in the relational approach, I argued that canoes and the techniques for carving are part and parcel of the artifice, and so while for some tribes the artifact was not continuous, the artifice was.<sup>162</sup> Thus, while it was not always possible to imitate the movements of experienced practitioners, I asserted that “the exercise of carving canoes in the present through replicating a canoe salvaged from the past is not to produce an identical copy of the original but to produce another canoe by identical means.”<sup>163</sup>

Producing an identical copy of the original canoe would convert carving into a modality of making, where the carvers began with an idea that is realized by removing pieces of wood, revealing the canoe that is considered to be already present in an ideal, conceptual or virtual form.<sup>164</sup> But as anyone who has tried to learn how to do, or make, something from a book, things are not this simple! By viewing this canoe carving as a modality of carving (or weaving) that produces another canoe by identical means, on the other hand, the original canoes were “read” not for their form but for what is revealed about the tools and movements that went into carving them.<sup>165</sup> “Reading” the original canoes thusly, it is, at the same time, an artifact *and* the embodiment of artifice; where the form of the canoe artifact has arisen through the artifice of skilled movement.<sup>166</sup> This is similar to Ingold’s point regarding recall and performance: “Just as to follow someone is to cover the same ground through the world of lived experience, so to remember is to retrace one’s steps. *But each retracing is an original movement, not a replica.*”<sup>167</sup> Therefore, objects are (re)placed right at the heart of ongoing processes of movement and relationships; and so artifacts, like organisms, grow: “Just as organic form is generated in the

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<sup>161</sup> Ingold, *Perception*, *supra* note 48 at 339.

<sup>162</sup> *To A Different Canoe*, *supra* note 89 at 192.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid* at 192-93.

<sup>167</sup> “From the Transmission of Representations to the Education of Attention” in Harvey Whitehouse, ed, *The Debated Mind: Evolutionary Psychology versus Ethnography* (New York: Berg, 2001) 113 at 145 [emphasis added].

unfolding of the morphogenetic field, so the form of the artefact evolves within what I have called a field of forces. Both kinds of field cut across the developing interface between the object (organism or artefact) and an environment which, in the case of the artefact, critically includes its ‘maker’.”<sup>168</sup>

This excursion into weaving and carving does have implications for continuity and the Court’s conception of evolution. As alluded to above, the view of objects as “made” results in meaning residing *in* the artifact. Any additional meaning attribute to the artifact must then be successively layered over the “unshakable core” of the original meaning.<sup>169</sup> Meaning, then, is divorced from the contexts of performance, and remains constant not only across time and space but also between individuals.<sup>170</sup> The view of tradition and continuity that accompanies this is the same as Chief Justice Lamer’s definition from *Van der Peet*: “those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word ‘tradition’ — that which is ‘handed down [from ancestors] to posterity’, *The Concise Oxford Dictionary* (9th ed. 1995), — implies these origins for the customs and laws.”<sup>171</sup> This is fully consistent with the genealogical model, as continuity is equated with replication, instead of the creativity, innovation, and growth that is part and parcel of being alive.<sup>172</sup> And while Lamer suggests the concept of continuity allows the objectified practices, customs and traditions of Aboriginal rights to evolve, by removing them from the performative and experiential web of relationships in which they are situated, their evolution only occurs superficially: the outside “form” of the tradition may “evolve”—within limits—but the content/“unshakable core” remains constant: “*Stripped to essentials*, an aboriginal claimant must prove a modern practice, tradition

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<sup>168</sup> Ingold, *Perception*, *supra* note 48 at 345.

<sup>169</sup> Ebert, “Resonance”, *supra* note 143.

<sup>170</sup> Ebert, *To A Different Canoe*, *supra* note 89 at 19.

<sup>171</sup> *Supra* note 1 at para 40 [alteration in original].

<sup>172</sup> See e.g. Ebert, *To A Different Canoe*, *supra* note 89 at 202.

or custom has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact”;<sup>173</sup> “Logical evolution,” an innovation introduced by McLachlin C.J., “means the same sort of activity, carried on in the modern economy by modern means.”<sup>174</sup> It is only by distinguishing form and substance that continuity can remotely be suggested as allowing the evolution of objectified practices, customs and traditions. One look at any dictionary will show that the concepts of continuity and evolution are contradictory and, perhaps, this explains why the Court has never explicitly and clearly defined either terms in Aboriginal rights rulings. Further, that Lamer held that the concept of continuity does not necessarily mean an “unbroken chain”<sup>175</sup> only serves to reinforce this.

Adopting the relational approach, on the other hand, meaning is not simply “handed down” or carried by form, instead both form and meaning, similar to my discussion above about dwelling, continually emerge within the relational contexts of ongoing, situated practices.<sup>176</sup> “Continuity,” to perhaps repeat myself, lies not in the faithful replication of objectified practices, customs and traditions from time immemorial (or, according to the Court, pre-contact), but is in the continuing lives of individuals located within a dramatic meshwork of relationships or situations that continually unfolds and enfolds as they dwell in the world.<sup>177</sup> As Borrows points out, “The *relational nature of traditions* means that they must constantly be retaught and re-

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<sup>173</sup> *Mitchell*, *supra* note 125 at para 12 [emphasis added]. This paragraph from *Mitchell* manifests an instance of the Court’s essentialism, as McLachlin continues that “[t]he practice, custom or tradition must have been ‘integral to the distinctive culture’ of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples’ identity. It must be a ‘defining feature’ of the aboriginal society, such that the culture would be ‘fundamentally altered’ without it.” *Ibid*.

<sup>174</sup> *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 25.

<sup>175</sup> *Van der Peet* (SCC), *supra* note 1 at para 65.

<sup>176</sup> Ebert, *To A Different Canoe*, *supra* note 89 at 202-03.

<sup>177</sup> *Ibid* at 203.



inscribed in people's lives through an *active process* of conveyance, reception, reformulation, and application.”<sup>178</sup>

*It is important to note, and I cannot stress this enough, that this conception of continuity and meaning I am putting forth here does not mean that traditions etc. are just “made up” or that “anything goes.”* But the ability to determine authenticity and veracity is *not* the exclusive purview of Eurocentric culture and the Court. Moreover, the idea of testing presumes a set of presuppositions and propositions, as mentioned in chapter 3, that are beyond testing and doubt that, in turn, “make the activity of questioning possible by determining what will count as evidence for arguments and verification.”<sup>179</sup> As I showed throughout Part I, these unacknowledged biases of the Court's approach to Aboriginal rights perpetuates the injustices of colonialism and fails to meet the standard set by its own doctrine of Aboriginal rights.

#### **IV. A Trans-Systemic Framework for Aboriginal Ways of Life**

The trans-systemic framework I am proposing here based on the relational approach resonates with Henderson's point above about Aboriginal jurisprudences: “In comprehending the continuity of First Nations jurisprudence, the judiciary needs to be particularly sensitive to the capacity of First Nations jurisprudence or activities to regenerate and to be exercised in a modern or evolving form.”<sup>180</sup> This performance or exercising of form, again, is not in the sense of it being in opposition to substance but as a process of cultural pragmatics, and the fact that meaning and so on emerges in the flux and flow of relationships and lives in the world does *not* mean there is no continuity or that they have changed as such determinations can only be arrived

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<sup>178</sup> *Indigenous Constitution*, *supra* note 62 at 271 [emphasis added]. Borrows also stresses that Aboriginal peoples never needed a declaration of independence, but of interdependence. See *ibid* at 160, 166-67, 271-72.

<sup>179</sup> Stanley J Tambiah, *Magic, science, religion, and the scope of rationality* (Cambridge: Cambridge University Press, 1990) at 64.

<sup>180</sup> *First Nations Jurisprudence*, *supra* note 4 at 215.

at through the genealogical model. So while it may appear at times that the relational approach and the genealogical model are similar, it is only superficial. For example, I argue that the simple shift of viewing culture as a noun to as a verb/process, the doctrine of logical evolution becomes obsolete.

Returning to the topic of making and weaving: in light of the above, it seems that the Court's formulation of Aboriginal rights is (necessarily) that they are "made"—in the sense that they are finished and complete at the time of contact with Europeans, and can only be superficially modified—"capable of evolution within limits" but "cannot be wholly transformed"<sup>181</sup>—from there on. By viewing Aboriginal rights as a modality of weaving, on the other hand, my proposed trans-systemic framework avoids the problems of basing legal theory or order on "culture." Individual practices and behaviours are not dispositionalized to an essentialized culture that is "often naturalized as stable, coherent, and common despite claims about culture's contradictoriness."<sup>182</sup> Variation and contradictoriness, while glossed over or ignored in the genealogical model,<sup>183</sup> poses no problem for the relational approach—in fact heterogeneity is taken as a given. Whereas the Court's conception of culture, as we have seen, is an abstraction that inverts variation and heterogeneity, in the relational approach, because knowledge and the person is inseparable from the dwelt-in world, variation, ambiguity and even uncertainty are assumed. For example, when "traditional" people are asked to articulate their

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<sup>181</sup> *R v Marshall*, [1999] 3 SCR 533 at para 19.

<sup>182</sup> Henderson, *First Nations Jurisprudence*, *supra* note 4 at 104.

<sup>183</sup> And sometimes used against Aboriginal peoples by the Court: "It became obvious during the course of the trial that what the Gitksan and Wet'suwet'en witness describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves.... In my judgment, these rules are so flexible and uncertain that they cannot be classified as laws." *Delgamuukw* (BCSC), *supra* note 35 at 206. Asch, although approaching this passage through the notion of cultural relativism, asserts that this assumption that the existence of even significant variation necessarily indicates that rules are not being followed is in error and that it is more appropriate to "enquire into a range of possibilities to explain and understand this apparent fact." Michael Asch, "Errors in *Delgamuukw*: An Anthropological Perspective" in Frank Cassidy, ed, *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books & The Institute for Research on Public Policy, 1992) 221 at 230. He goes on to explore three possible hypotheses his approach would generate that are quite insightful.

knowledge, they often respond with answers like “This is how we do it here.”<sup>184</sup> While such a response may seem ambiguous, Bjørn Bjerkli, an anthropologist writing about the use of “tradition” in the contexts of a land rights dispute between the Norwegian state and a group of Indigenous peoples in northern Norway, argues they are actually referring to something quite specific: “They describe precisely the manner in which many people act in relation to their experienced reality,” and reflect the uncertainty of the future that makes following a “prefixed pattern” ill-advised, and so knowledge and “tradition” need to be flexible and responsive to the contexts of individuals’ lives.<sup>185</sup> As we have seen, the Court’s approach to Aboriginal rights is akin to this “prefixed pattern” and hinders not only Aboriginal peoples’ ability to be “authentic” but also to respond to the changing contexts of a continually changing world. On the other hand, viewed relationally the growth and development of both knowledge and the person is understood “as a *movement along a way of life*, conceived not as the enactment of a corpus of rules and principles (or a ‘culture’) received from predecessors, but as the negotiation of a path through the world.”<sup>186</sup> We have come full circle back to the version of “way of life” I proposed above.

Moreover, while making comes to an end when the final form of the object is completed, “weaving (like dwelling) continues for as long as life goes on – punctuated but not terminated by the appearance of the pieces that it successively brings into being.”<sup>187</sup> And while Willie Nelson may have been right, the relational approach, similar to what Bjerkli pointed out regarding knowledge, is in fact not “ambiguous” or “philosophical” but is quite (at least relative to the Court’s orthodox approach) specific, coherent and more faithful to life as it is actually lived. This

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<sup>184</sup> Bjørn Bjerkli, “Land Use, Traditionalism and Rights” (1996) 13 *Acta Borealia* 3 at 9.

<sup>185</sup> *Ibid* at 17-18.

<sup>186</sup> Ingold, *Perception*, *supra* note 48 at 145-46 [emphasis in original].

<sup>187</sup> *Ibid* at 348. Note the parallels with how change is formulated in the relational approach discussed above.

is because it is not based on a fictional person and “culture” that the Court and its Eurocentric epistemology favours.

By viewing as a modality of weaving, Aboriginal rights continually *grow* as part of an ongoing relationship between Aboriginal peoples and the Crown. An implication of this is that, in contrast to Justice Bastarache’s opposition of a right to sustenance and a right to the traditional means of sustenance, Aboriginal rights are no longer plural—there is only one: an Aboriginal right to self-determination. Truly taking the Aboriginal perspective into account, and not as “cognizable,” demands self-determination, and will assist in developing a framework that does not subordinate Aboriginal legal systems to the common law; and by giving equal status to Aboriginal peoples, their perspectives and their traditions, Borrows suggests “this will reveal ways to achieve their greater coordination.”<sup>188</sup> Only through this increased collaboration—as *equals*—can the reconciliatory purpose of s. 35(1), particularly constitutional reconciliation, held in *Van der Peet* be arrived at.<sup>189</sup> Further, Henderson argues that reading s. 35(1) together with s. 52(1) implies that Canadian federalism needs to be fundamentally reformed to recognize that the constitutional rights of Aboriginal peoples are politically equal with at least provincial powers.<sup>190</sup> This reformulation is needed as in the current formulation, Aboriginal peoples are excluded from meaningful participation and influence in governance.<sup>191</sup>

That this constitutional reconciliation signals self-determination arises from the imperial treaties negotiated between European Crowns and various Aboriginal peoples. While treaties between Europeans and non-Europeans challenged the fundamental premises of nineteenth

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<sup>188</sup> *Indigenous Constitution*, *supra* note 62 at 119.

<sup>189</sup> See e.g. James (Sa’ke’j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007) at 1038 [Henderson, *Treaty Rights*].

<sup>190</sup> *Ibid* at 1037.

<sup>191</sup> See e.g. James (Sákéj) Youngblood Henderson, “Dialogical Governance: A Mechanism of Constitutional Governance” (2009) 72 Sask L Rev 29 at 35-36 [Henderson, “Dialogical Governance”]; John Borrows, “Living Between Water and Rocks: First Nations, Environmental Planning and Democracy” (1997) 47 UTLJ 417 at 446-47.

century positivism—as treaties recognized the autonomy and, from the Eurocentric perspective, sovereignty of Aboriginal peoples<sup>192</sup>—from the *Aboriginal perspective*, the treaties represented an acknowledgement of their inherent sovereignty or self-determination.<sup>193</sup> These treaties brought Aboriginal peoples under the protection of English and French law, *but* it was not an alliance imposed on Aboriginal peoples.<sup>194</sup> Rather, the alliance was based on the will of Aboriginal peoples and was not inevitable.<sup>195</sup> Henderson asserts that the treaties make no sense without this understanding and serves to obscure the exercise of Aboriginal self-determination.<sup>196</sup> In this way, the Eurocentric understanding of these treaties is like they are “made,” and, therefore, finished—hiding or erasing the processes of their creation.

The sovereignty of Aboriginal peoples has been confirmed by the Supreme Court of Canada (SCC) in *R. v. Sioui* where Lamer J. held, with regards to the 1760 Treaty with the Hurons, that

we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.... [Treaties of alliances] clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.<sup>197</sup>

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<sup>192</sup> James (Sákéj) Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 Sask L Rev 241 at 246 [Henderson, “Treaty Federalism”]; Anghie, *supra* note 16 at 39.

<sup>193</sup> See e.g. Henderson, “Treaty Federalism”, *supra* note 192 at 246; James (Sákéj) Youngblood Henderson & Jaime Battiste, “How Aboriginal Philosophy Informs Aboriginal Rights” in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford: Oxford University Press, 2013) 66.

<sup>194</sup> Henderson, “Treaty Federalism”, *supra* note 192 at 246.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> [1990] 1 SCR 1025 at 1052-53 [*Sioui*]; Henderson, “Treaty Federalism”, *supra* note 192 at 253. Moreover, does not Justice Binnie’s use of “new sovereignty” to refer to the Crown’s sovereignty and use of “sovereign succession” also imply that Aboriginal peoples were sovereign at the time of contact? See e.g. *Mitchell*, *supra* note 125 at para 150. Justice Binnie also, in the same case, explicitly acknowledges that the Mohawk were sovereign. *Ibid* at para 158.

By removing “culture” from Aboriginal rights, the relational approach makes it not possible for the Court to maintain their position that such rights do not include “abstract political rights” like self-determination.<sup>198</sup>

Furthermore, self-determination will also assist in a difficulty the category of “Aboriginal” has created for the Court’s tests. As discussed, the cut off point for “Aboriginal rights,” according to *Van der Peet*, is at the moment just prior to the cusp of European contact. Yet, by doing so Lamer C.J. acknowledges that such a standard raises issues for Métis claimants—but he declined to address them, leaving it until a Métis claim was before the Court.<sup>199</sup> It took seven years for this to occur, and in *R. v. Powley* the Court modified “certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis.”<sup>200</sup> The Court did leave the “situation” that the doctrine of Aboriginal rights is founded on (prior occupation) but held that the “purpose of s. 35 as it relates to the Métis is... different from that which relates to the Indians or the Inuit.”<sup>201</sup> Two of the significant modifications the Court made to the *Van der Peet* test in *Powley* are that the integrality

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<sup>198</sup> See e.g. Asch, “Judicial Conceptualization”, *supra* note 28 at 131. As seen in the quote from *Sioui* above, the Court has acknowledged that Aboriginal nations were sovereign (see text accompanying note 197), but they have since gone on to restrict the scope of self-governance by treating it like a claim to any Aboriginal right: “In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.” *Pamajewon*, *supra* note 30 at para 24. Thus, any attempt to assert a claim to self-governance is brought within the scope/purview of the *Van der Peet* test: “Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.” *Ibid* at para 27. “Self-government” is thereby restricted and reduced into a specific, objectified activity: “As such, the most accurate characterization of the appellants’ claim is that they are asserting that s. 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands.” *Ibid* at para 26. In this we again see the hierarchical, atomized conception of culture discussed in chapter 2 (see text accompanying notes 98-101). Moreover, it appears in *Delgamuukw* (SCC) that not only must self-governance be framed in specific enough terms, but that it must be “cognizable” as well: “Unsurprisingly, as counsel for the Wet’suwet’en specifically concedes, the appellants advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1).” *Supra* note 57 at para 170.

<sup>199</sup> *Van der Peet* (SCC), *supra* note 1 at paras 66-67.

<sup>200</sup> [2003] 2 SCR 207 at para 14 [*Powley*].

<sup>201</sup> *Ibid* at paras 16-17.

component was shifted from pre-contact to the historical period<sup>202</sup> and instead of contact or assertion of sovereignty as the cut off, for Métis claims it is “effective European control.”<sup>203</sup> Larry Chartrand has written that Lamer presented two options for Métis rights in *Van der Peet*: one involved creating two separate bodies of Aboriginal rights law; while the other involved what Chartrand called the “trace theory” of Métis rights in which their rights were determined based on their descentance from their First Nations ancestors.<sup>204</sup> While Chartrand is critical of the “trace” approach to Métis Aboriginal rights,<sup>205</sup> and proposes an alternate framework that does not create two sets of Aboriginal rights law (based on reconceptualizing “contact” and “assertion of sovereignty”),<sup>206</sup> his proposal, I argue, would still result in two separate frameworks for Aboriginal rights. Yes I agree that, as Justice Vickers stated in *Tsilhqot’in Nation v. British Columbia*, “that private adventurers or commissioned officers of His Majesty’s Royal Navy, even with their best intentions, can to the degree required by international law, assert sovereignty over vast territories by planting a flag and speaking to the utter silence of the mountains and boreal forests. They are, in my view, just words blowing in the wind.”<sup>207</sup> What matters more in my proposal is not some fictitious cut off point where the Court sits in judgment of what is, to adopt Chartrand’s phrasing,<sup>208</sup> “Indian enough” but continuity in dwelling. Again, this “continuity” is formulated through cultural pragmatics and not how the Court has. And it is

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<sup>202</sup> This again highlights (the conceit of) Eurocentric tunnel history, where “history,” and Indigenous peoples’ participation in it, began when they encountered Europeans. See e.g. Eric R Wolf, *Europe and the People Without History* (Berkeley: University of California Press, 1982).

<sup>203</sup> Powley, *supra* note 200 at para 18.

<sup>204</sup> “Métis Aboriginal Title in Canada” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon SK: Purich Publishing, 2004) 151 at 154. Chartrand states that in Powley the trace theory was “expressly rejected.” *Ibid* at 154-55; see too Powley, *supra* note 200 at para 38.

<sup>205</sup> See e.g. *supra* note 204 at 158.

<sup>206</sup> *Ibid* at 152.

<sup>207</sup> *Supra* note 64 at para 596. While Vickers is rejecting prior arguments before, and positions of, the Court regarding “contact” and the assertion of sovereignty (see, for example, notes 67-68 in chapter 4), the possibly accidental allusion to Bob Dylan is quite appropriate. Much like the number of roads a man must walk to become a man, “European influence,” “contact” and the like are Sorites paradoxes—perhaps the Court should ask one of the four Winds for answers then.

<sup>208</sup> *Supra* note 204 at 160.

in Chartrand, and the Court's, rejection of trace theory that Métis Aboriginal rights still differ from First Nations and Inuit rights: as Lamer based the pre-contact requirement, as discussed above, on how "tradition" is defined in the dictionary which illustrates why the genealogical model is referred to as it is.<sup>209</sup> Thus, *non*-Métis Aboriginal rights are still based on descent from pre-contact ancestors in the Court's current approach, while Métis rights, according to Chartrand and *Powley*'s rejection of trace theory, are not.<sup>210</sup>

My concern here, though, is not with Métis Aboriginal rights *per se*, and, similar to Chief Justice Lamer, I will leave the implications of my argument for their rights to others. My point is that by adopting the trans-systemic framework I have advanced here, issues like the different standards for First Nations and Inuit Aboriginal rights and those of the Métis is avoided as, again, my framework is based on dwelling and not the "culture" that is the root cause of all the problems identified here and by others. I agree with Chartrand that the "prior" of "prior occupation" needs clarification and "de-dispositionalization," while for "Aboriginal," harmonizing.<sup>211</sup>

This connects with another benefit of my framework: the Court has stated that Aboriginal title is a subset of Aboriginal rights, but then went on to establish a different standard for its establishment.<sup>212</sup> Chief Justice Lamer justifies the difference on a number of reasons for why the assertion of British sovereignty is appropriate for title but not for rights.<sup>213</sup> Yet two of the three reasons do not really distinguish title from rights: the "theoretical" one is that "title arises out of

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<sup>209</sup> See *supra* note 132 and accompanying text.

<sup>210</sup> Again, Lamer's paradoxical concession that "continuity" does not entail an "unbroken chain" (*Van der Peet* (SCC), *supra* note 1 at para 65) does not negate my point here, as his definition of tradition still implies biological descent, as the "unbroken chain" refers to the continuity of objectified practices, customs and traditions.

<sup>211</sup> And in this context I think Chartrand's proposal is persuasive. *Supra* note 204 at 178.

<sup>212</sup> *Delgamuukw* (SCC), *supra* note 57 at paras 138, 144.

<sup>213</sup> *Ibid* at para 145.



prior occupation,”<sup>214</sup> but this is exactly what he stated, in *Van der Peet*, as the “simple fact” for the existence of the doctrine of Aboriginal rights. This theoretical reason is also based on title, like rights, arising “out of the *relationship* between the common law and pre-existing systems of aboriginal law.”<sup>215</sup> Why the different test? Can this not apply to Aboriginal rights as well? The “practical” reason Lamer gives for justifying sovereignty for title and not rights is that “it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture.”<sup>216</sup> That “first contact” is difficult to determine is continually illustrated in Aboriginal *rights* cases, as discussed above. Yet instead of creating concreteness, this difficult test results in a significant amount of judicial discretion and indeterminacy.

Thus, for the most part, Chief Justice Lamer’s justification seems equally applicable to *both* Aboriginal rights *and* title—which should not necessarily be a surprise given that Aboriginal title is just at one end of a spectrum of rights—so why does he maintain the difference? In the other reason Lamer provides, he falls back on to the common law’s conception of title and asserts that “aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact.”<sup>217</sup> He continues by stating that title in the common law can be established by *occupation*—but if Aboriginal rights exist because Aboriginal peoples “were already here, living in distinct communities *on the land*,”<sup>218</sup> where is the difference again? The foundational problem is that if no evidence of Aboriginal peoples inhabiting the land—either specifically or generally—at European “contact” is admitted then neither Aboriginal rights nor

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<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid* [emphasis added].

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> *Van der Peet* (SCC), *supra* note 1 at para 30 [underlining in original; emphasis added].

title exist. Only by relying on Eurocentrism and the implications of its epistemology discussed in the previous chapters, and by ignoring the Aboriginal perspective, can he support this distinction.

By adopting my proposed trans-systemic framework, similar to “Aboriginal,” both Aboriginal rights *and* title are harmonized and the contradictions avoided. In fact, as with artifact and artifice et al, the distinction between Aboriginal rights and title is questionable. Again we see how the Court’s conception of “culture,” even in Aboriginal title cases, complicates and creates problems unnecessarily. Approached from the relational approach, “Aboriginal rights” becomes more coherent as one is not forced, as the Court has been, to fragment both the Aboriginal and the rights: *all* are anchored in and are part of a dynamic, continuing engagement in locales.

Furthermore, the fact that Aboriginal rights and Aboriginal title are no longer distinct reinforces my assertion that there is only the pre-existing, inherent sovereignty of Aboriginal nations, tribes, and so on, or, at the least, an Aboriginal right to self-determination. In turn, this would bring also Aboriginal rights jurisprudence in Canada inline with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).<sup>219</sup> This declaration also supports why it should be self-determination and not self-government, as Article 4 includes the latter within the former, highlighting that self-governance is a more restricted concept not only in terms of rights afforded but also because it tends to be in a form that reflects Eurocentric structures and organization, and not “traditional” forms of governance.<sup>220</sup>

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<sup>219</sup> 2007, Doc A/61/L67 [UNDRIP].

<sup>220</sup> To give an analogous example from the Puget Sound region, when the American government sent a delegation to negotiate treaties with the Indigenous peoples, one of the problems they faced involved a lack, from the Eurocentric perspective, of leaders and political organization that would allow the treaties to be negotiated. Because the government negotiators were aware of this “problem,” they took steps to change this, which resulted in the creation of “chiefs” and “tribes.” Ebert, *To A Different Canoe*, *supra* note 89 at 112-14. See also Alexandra Harmon, *Indians in the Making: Ethnic Relations and Indian Identities around Puget Sound* (Berkeley: University of California Press, 1998) at 79, 85, “Lines In Sand: Shifting Boundaries Between Indians and Non-Indians In the Puget Sound Region” (1995) 26 *Western Historical Quarterly* 429 at 443-44.

In my formulation, this Aboriginal right to self-determination is not secessionist. Even UNDRIP acknowledges that Aboriginal self-determination exists within a larger state<sup>221</sup> and I would be surprised if a significant proportion of Aboriginal peoples in Canada wished to separate—at least that is my impression. This is supported by the conclusions of the Royal Commission on Aboriginal Peoples (RCAP), where, although they are discussing the more limited idea of self-government, their point is applicable to self-determination:

Section 35 does not warrant a claim to unlimited governmental powers or complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.<sup>222</sup>

This right is not (or should not) be circumscribed in the way Aboriginal rights are limited or justifiably infringed in the current legal framework. Instead, it is “circumscribed” in the sense of equal partners in a “shared sovereignty.” I will return to this issue of “shared” or “sphere of” sovereignty shortly.

It is also important to be mindful of the devastation created by colonialism and colonial policies—some of which, as we have seen, continue today. As a result, as mentioned in the Preface, not all Aboriginal peoples are currently prepared and able to apply their laws. Thus, this Aboriginal right to self-determination encompasses a right for each community, nation, etc. to determine their readiness. Given their role in colonial policies and practices, the Crown (and even the Court) should not take this recovery as a way to add a burden similar to the “organized society” standard.

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<sup>221</sup> *Supra* note 219 at Article 46.2.

<sup>222</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Minister of Supply & Services Canada, 1996) at 214.

Thus, my trans-systemic framework demands equality between Aboriginal peoples, their laws and legal systems, and the Canadian common law. This equality is part of an ongoing Aboriginal peoples–Crown relationship that is also founded on egalitarianism and not hierarchy. This resonates with Chief Justice Lamer’s admonishment in *Van der Peet* about Aboriginal rights and the Canadian legal system.<sup>223</sup> My proposal diverges from Lamer’s as he held that the relationship is that the former is within the latter, thereby justifying his “cognizable” approach, whereas I am arguing that Aboriginal legal systems and the Canadian legal system are synonymous. In other words, together they form an *indigenous* Canadian legal system in which no one legal tradition is privileged over the other. It is only in this way that the challenge set forth by Borrows at the outset of this thesis can be met. As part of this, Borrows suggests that only when Aboriginal laws and legal systems are considered to be an actual source of rights and obligations will Aboriginal jurisprudences “more fully permeate the consciousness of common law and civil law practitioners and theorists.”<sup>224</sup>

## **V. Converging Legal Traditions**

So far I have laid out an alternate, trans-systemic conception of Aboriginal rights, but the story is not yet complete. Because the constitutional purpose of s. 35(1) is said to be the reconciliation of Aboriginal peoples’ pre-existence with the assertion Crown sovereignty,<sup>225</sup> not only is a trans-systemic framework necessary, but a *convergence* of Aboriginal legal systems and practices and the common law and civil law is required as well. This convergence finds further justification in the Court’s position that Aboriginal rights cannot be defined on the bases of the tenets of liberal

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<sup>223</sup> *Supra* note 1 at para 49: “As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada.”

<sup>224</sup> *Indigenous Constitution*, *supra* note 62 at 119.

<sup>225</sup> *Van der Peet* (SCC), *supra* note 1 at para 31.

enlightenment.<sup>226</sup> One important, and perhaps easiest, step is the appointment of Aboriginal judges, particularly at the SCC level, who are also knowledgeable in their “traditional” law and legal practices. Or this could include, at least in the contexts of cases involving Aboriginal rights claims, one or more knowledgeable Elders (equally) participating in judicial decision-making.<sup>227</sup> As Borrows writes, “The expansion of our conventional conceptions of Canadian law will also require greater participation by Indigenous peoples.”<sup>228</sup>

Some may point to the Cree Court initiative in Saskatchewan as an example of convergence. This court is part of the provincial system, conducts proceedings in Cree and is presided over by a Cree-speaking judge.<sup>229</sup> It has been suggested that by using the Cree language, justice is more accessible.<sup>230</sup> Borrows also points out that by conducting proceedings in Cree the “dynamics of the legal process are different. Linguistic relationships are possible that are not easily comprehended in English,”<sup>231</sup> and results in rights and obligations being framed differently by the parties.<sup>232</sup> Yet this court is founded on the common law system and so Borrows contends that it does not represent a fully functioning Aboriginal legal system.<sup>233</sup> Instead, it only “faintly affirms Cree legal systems” due to this grounding, and continuing use, of the structure and procedures of the common law—many of which are incompatible with Cree legal traditions.<sup>234</sup> As a result, Borrows writes, “Despite the Cree Court’s great success, more

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<sup>226</sup> *Ibid* at para 19.

<sup>227</sup> Who qualifies as a knowledgeable Elder should not be decided based on outside standards as well, but on the basis of the relevant, specific “Aboriginal perspective.”

<sup>228</sup> *Indigenous Constitution*, *supra* note 62 at 119.

<sup>229</sup> See e.g. Wanda McCaslin, “Saskatchewan holds court in Cree” (2001) 6:4 Justice as Healing: A Newsletter on Aboriginal Concepts of Justice 6 at 6.

<sup>230</sup> See e.g. *ibid*.

<sup>231</sup> *Indigenous Constitution*, *supra* note 62 at 86.

<sup>232</sup> *Ibid* at 216.

<sup>233</sup> *Ibid* at 86.

<sup>234</sup> *Ibid*.

work lies ahead to appropriately recognize and affirm the Cree legal system *on its own terms*.”<sup>235</sup> Therefore, the Cree Court only represents a partial convergence; and, as such, it does not represent an instance of what has been referred to as “shared sovereignty.”

Above I mentioned the “sphere of sovereignty” discussed by RCAP<sup>236</sup> that is shared by federal, provincial, and Aboriginal governments. RCAP asserted that these three orders of government arose via s. 35 as it provided the foundation for recognizing Aboriginal governments as being one of the three distinct orders.<sup>237</sup> As a result, sovereign powers are *shared* in Canada, through a collective “pooling of existing sovereignties.”<sup>238</sup> RCAP held that such a shared sovereignty is “a hallmark of the Canadian federation” and is a “central feature” that should link the inherent and treaty powers of Aboriginal peoples with the other two sovereign powers, generating “three-cornered relations” between the three sovereign powers.<sup>239</sup> And while many of the powers and the exercising of them are shared, each order is sovereign within their own respective sphere.<sup>240</sup> This pooling, then, is not via assimilation or integration into a “systematic singularity,” but rather a convergence where each sphere of sovereign power interweaves and intermingles—equally implemented and respected.<sup>241</sup> As Henderson also points out, this convergence and equality already has a basic template in Canada in the interaction of the common law and the civil law.<sup>242</sup>

Further, Justice Binnie held in his separate reasons in *Mitchell* that this idea of “shared sovereignty” was a logical evolution of what the Two Row (or Gus-Wen-Tah) Wampum

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<sup>235</sup> *Ibid* [emphasis added].

<sup>236</sup> See *supra* note 222 and accompanying text.

<sup>237</sup> Canada, *supra* note 222 at 240.

<sup>238</sup> *Ibid*; Henderson, *Treaty Rights*, *supra* note 189 at 821.

<sup>239</sup> Canada, *supra* note 222 at 240.

<sup>240</sup> *Ibid* at 240-41.

<sup>241</sup> See e.g. Henderson, *Treaty Rights*, *supra* note 189 at 821.

<sup>242</sup> *Ibid*.

symbolizes/-d for the Mohawk.<sup>243</sup> There, Binnie wrote that this idea of shared sovereignty “asserts that First Nations were not wholly subordinated to non-aboriginal sovereignty but over time became merger partners.”<sup>244</sup> Similar to Borrows’ proposal, Binnie quotes from RCAP who stated that “Aboriginal governments give the constitution [of Canada] its deepest and most resilient roots in Canadian soil.”<sup>245</sup> Binnie added that with the “s. 35(1) reconciliation process” established in 1982, this updated conception of Crown sovereignty as being shared is of importance because the “Constitution was patriated and all aspects of our sovereignty became firmly located within our borders.”<sup>246</sup> Binnie then concluded that for the principle of shared sovereignty “to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort.”<sup>247</sup> It is through this notion of shared sovereignty that generates convergence.<sup>248</sup>

Part of implementing this convergence is a reading of all the forms of jurisprudences—both Aboriginal and non-Aboriginal—together to produce a “symbiosis” of the various constitutional orders.<sup>249</sup> A result of this convergence analysis, similar to shared sovereignty, is that neither government powers nor Aboriginal rights are absolute, but through symbiosis *all* rights are protected equally on their own terms.<sup>250</sup> It follows that the Court must alter not only their orthodox “cognizable” approach to Aboriginal epistemologies and jurisprudences, but also their atomistic approach as well. Part of this process will involve the aforementioned Aboriginal

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<sup>243</sup> *Supra* note 125 at para 129. Binnie provides a brief overview of the Gus-Wen-Tah Wampum in *Mitchell*, at paras 127-28.

<sup>244</sup> *Ibid* at para 129; Henderson, *Treaty Rights*, *supra* note 189 at 821.

<sup>245</sup> Canada, *supra* note 222 at 214, as quoted by Binnie in *Mitchell*, *supra* note 125 at para 129 [alteration by Binnie].

<sup>246</sup> *Mitchell*, *supra* note 125 at para 129. See too Henderson, *Treaty Rights*, *supra* note 189 at 819, *First Nations Jurisprudence*, *supra* note 4 at 87.

<sup>247</sup> *Mitchell*, *supra* note 125 at para 129 [emphasis in original].

<sup>248</sup> Henderson, *First Nations Jurisprudence*, *supra* note 4 at 87.

<sup>249</sup> Henderson, *Treaty Rights*, *supra* note 189 at 829, “Dialogical Governance”, *supra* note 191 at 53.

<sup>250</sup> Henderson, *Treaty Rights*, *supra* note 189 at 827-28, “Dialogical Governance”, *supra* note 191 at 61.

presence on the Court, but may also involve non-Aboriginal judges learning the languages and jurisprudences, as best they can, of the Aboriginal claimants for progress to occur.<sup>251</sup> While I have experienced how difficult this can be myself, it has been impressed on me by my Aboriginal teachers how important learning the language is and the insights that it will allow into the culture more generally. As with the translation of legal traditions mentioned earlier,<sup>252</sup> this convergence is not unidirectional: as Henderson asserts that qualified Aboriginal peoples<sup>253</sup> also have “corresponding constitutional responsibilities” to educate non-Aboriginal peoples about their jurisprudences.<sup>254</sup> Similar to my proposal regarding Aboriginal rights and the resulting ongoing relationship, this convergence is dialogical and *grows* as contexts and circumstances continue to unfold. In other words, this convergence, like Aboriginal rights, is part of the process of cultural pragmatics and becomes enmeshed in the fluidity of various “ways of life.”

To illustrate one possible way of converging Aboriginal legal traditions with the common law, let us return to the Northwest Coast potlatch complex introduced in the Preface. As I mentioned there, and elsewhere,<sup>255</sup> this is an initial formulation on my part. It needs further development and, in my case especially, fieldwork in Canada. My hope is that, similar to Borrows, this proposal “represents a further invitation for those interested in this topic to join with me” and others.<sup>256</sup>

But before making this initial exploration some qualifications: first, by suggesting the convergence of the potlatch complex and the laws performed therein, and judicial decision-

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<sup>251</sup> See e.g. James (Sákéj) Youngblood Henderson, “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon SK: Purich Publishing, 2004) 67 at 73 [Henderson, “Aboriginal Jurisprudence”].

<sup>252</sup> See text accompanying notes 68-69 in chapter 1.

<sup>253</sup> As mentioned above, *supra* note 227, this is “qualified” according to the standards of the particular Aboriginal peoples and not by those imposed from without.

<sup>254</sup> “Aboriginal Jurisprudence”, *supra* note 251 at 77.

<sup>255</sup> For a more full treatment of the following proposal see Mark Ebert, “Feasting Judicial Convergence: Reconciling Legal Perspectives through the Potlatch Complex” (2013) 18 Appeal 21 [Ebert, “Feasting”].

<sup>256</sup> Borrows, *Indigenous Constitution*, *supra* note 62 at 10.



making I am *not* equating the potlatch complex with the court of the common law, while some have made the parallel (as mentioned in the Preface), I focus on the potlatch complex as it was, and continues to be, one of the constitutional mechanisms that define the way of life for the peoples, and one of the central arenas where issues could be discussed, and decisions were made or, at least, publicized. Moreover, my proposal is specific to the peoples of coastal British Columbia who “traditionally” held these gatherings and do not mean it in a general “Feasting” (or “Potlatching”) sense as a panacea for converging *all* Aboriginal forms of “feasting” and legal systems with the common law.<sup>257</sup> Moreover, it is again important to be mindful of the (continuing) effects of colonialism and colonial policies. And because there is variation in the contemporary readiness of specific coastal British Columbia First Nations to apply their laws via the potlatch complex, the following illustration of convergence is based on the assumption that the particular peoples have determined themselves that they are prepared and able to participate in such a convergence.<sup>258</sup>

To refresh reader’s memories: as discussed in the Preface, the potlatch complex has captured the ethnographic imagination of many observers and has been important in the development of cultural anthropology in North America.<sup>259</sup> Generally, these are formal events hosted by a prominent person(s), community, clan or other corporate group, that provide, in part, a forum to express ownership, jurisdiction, and rights (among other things) for validation by guests invited to witness.<sup>260</sup> Many outsiders have attempted to explain the purpose and goal of

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<sup>257</sup> I refer the reader again to my other discussion where I mention some other important qualifications. Ebert, “Feasting”, *supra* note 255 at 21-22.

<sup>258</sup> This is one of the qualifications I discuss in more depth in *ibid*, particularly at 22, 34.

<sup>259</sup> See e.g. Regna Darnell, “The Pivotal Role of the Northwest Coast in the History of Americanist Anthropology” (2000) 125/126 *BC Studies* 33.

<sup>260</sup> See e.g. NJ Sterritt, “Unflinching Resistance to an Implacable Invader” in Boyce Richardson, ed, *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) 267 at 277; Margaret Anderson & Marjorie Halpin, “Introduction” in Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notebooks* (Vancouver: UBC Press, 2000) 3 at 31.

the potlatch complex, but most only capture part of what Marcel Mauss has called a “total social phenomena”: “the potlatch is much more than a juridical phenomenon: it is one that we propose to call ‘total.’ It is religious, mythological, and Shamanist,... The potlatch is also an economic phenomenon,... [and] is also a phenomenon of social structure.”<sup>261</sup> And the list could be longer, as the institution is situated as a nexus in the cultural meshwork of Northwest Coast First Nations peoples that includes both human and non-human beings and the world, and is central to their governments, laws, social structures, and “worldviews.”<sup>262</sup> As a result, potlatches and feasts are held for many reasons, but often have to do with changes in social status and involve the coming together of people in a public venue so that the host(s) can have claims witnessed and, through the distribution of property to those guests invited to witness, have their assertions and demonstrations of social prerogatives and status validated.<sup>263</sup>

An example of this, and of the potlatch complex’s role in Aboriginal governance, involves names. Names are probably the most important marker of status and leadership on the coast. They are often considered to be a form of property held by, in the contexts of the Gitksan, each *wilp* (or “House”) which own a number of ranked names that indicate the holder’s status, and, especially for higher ranked names, includes rights and duties to the world and other persons (including other-than-human persons).<sup>264</sup> The highest of these ranked names in a *wilp* are held by the *simgigyet* or *sigidim haanak’a* (both often glossed as “chief”) and the highest of

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<sup>261</sup> Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (London: Routledge, 2001) at 48-49.

<sup>262</sup> See e.g. Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 31; Antonia Mills, *Eagle Down is Our Law: Witsuwit’en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) at 43. I have put the term worldview in quote marks as, from the relational approach, “worldview,” similar to “culture,” is a product of the genealogical model via the two Great Divides and the Cartesian dualism. See, for example, Ingold, *Perception*, *supra* note 48 at 14-15; Henderson, “State of Nature”, *supra* note 24 at 12; Gordon, *supra* note 131 at 23.

<sup>263</sup> See e.g. Homer G Barnett, “The Nature of the Potlatch” (1938) 40:3 *American Anthropologist* 349.

<sup>264</sup> See e.g. Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, AR Buck and Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22 at 31.

these “chiefly” names is also the name of the *wilp* itself.<sup>265</sup> To take or make a claim to a name must be formalized through the potlatch complex and it is possible to elevate the status of a name through feasting and/or potlatching and hard work as well.<sup>266</sup>

The potlatch institution is particularly important for the chief’s status and authority, as through the performance and telling of the House’s histories, songs, dances and other displays of House property, the chief’s power is contained. Hosting a feast or potlatch allows the chief to publicly demonstrate the wealth of the House, both tangible and intangible, and therefore the prestige of the chiefly name through these performances and through gifting and feeding invited guests. Further, this demonstration serves to reaffirm the interconnections between humans, non-humans, and the land. As Delgam Uukw explained in his opening statement to the Court in *Delgamuukw* (BCSC):

For us, the ownership of the territory is a marriage of the Chief and the land... The land, the plants, the animals and the people all have spirit – they all must be shown respect. *That is the basis of our law....* My power is carried in my House’s histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances performed, and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. *In this way, the law, the Chief, the territory, and the Feast become one.*<sup>267</sup>

Thus, the potlatch complex validates authority and provides a forum to exercise it according to, in this case, Gitksan law. Chiefs can then use this authority to settle disputes and breaches of law both within and outside the contexts of the potlatch complex.<sup>268</sup>

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<sup>265</sup> Anderson & Halpin, *supra* note 260 at 22. The reasons for the two terms both referring to “chief” in English is that each is gender specific: the former used for males, the latter females. P Dawn Mills, *For Future Generations: Reconciling Gitksan and Canadian Law* (Saskatoon, SK: Purich Publishing, 2008) at 18.

<sup>266</sup> See e.g. Overstall, *supra* note 264 at 31.

<sup>267</sup> Gisday Wa & Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet’suwet’en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987* (Gabriola, BC: Reflections, 1989) at 7 [emphasis added].

<sup>268</sup> Mills, *supra* note 262 at 43.

The forum provided by the potlatch complex, then, has been suggested as allowing the formalization, elaboration and ratification of important social and political decisions through giving gifts to invited guests.<sup>269</sup> Much of the work, though, is done before the actual public gathering. This work includes much of the exchange and accumulation of goods needed for hosting a feast or potlatch as well as the negotiations and discussions.<sup>270</sup> For example, in the build up to *Delgamuukw*, the co-plaintiff Wet'suwet'en held a feast to discuss the land claim and to clarify and validate the boundaries of their territory, as feasts are "the proper forum in which to discuss such matters."<sup>271</sup> Chief Justice McEachern, though, used these "meetings" as a reason to question, and, ultimately reject, much of the evidence put forth by the Gitksan and Wet'suwet'en: "the fact that the plaintiffs' claim has been so much discussed for so many years, and the further fact that so much of the evidence was assembled communally in anticipation of litigation, or even during this litigation, is a fact which must be taken into account."<sup>272</sup> Much like the "pizza test," this position taken by McEachern is preposterous: did he think that the Crown and their lawyers did not prepare and meet before and during the case? Or is it because it was a *communal* process? (Which would also seem to still not make much sense given that both Aboriginal rights and title are *communal* in nature.<sup>273</sup>) Furthermore, while much of the work is completed before the event, the potlatch complex does provide a forum where "differences of opinion can be aired calmly and witnessed."<sup>274</sup>

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<sup>269</sup> See e.g. Daly, *supra* note 262 at 168-69; Mills, *supra* note 262 at 43.

<sup>270</sup> My thanks to Charles Menzies and Val Napoleon who both mentioned this to me.

<sup>271</sup> Mills, *supra* note 262 at 44.

<sup>272</sup> *Delgamuukw* (BCSC), *supra* note 35 at 41. In this we again find a power asymmetry and the "telescoping" of history discussed in chapter 4, as the same standard did (or was) not applied to the activities of the Crown and legislative enactment that limited the potlatch complex and the exercising of Aboriginal law by Aboriginal peoples for much of the colonial history in Canada.

<sup>273</sup> See e.g. *Ahousaht Indian Band v Canada (AG)*, [2010] 1 CNLR 1 at para 287.

<sup>274</sup> Mills, *supra* note 262 at 71. This has also, to some extent, been acknowledged by the Court. See e.g. *Delgamuukw* (SCC), *supra* note 57 at para 93.

The potlatch complex, then, including the preparations for it, is an ever evolving, fluid process through which consensus and decisions are made. Each particular public gathering is a snapshot during a continual process of cultural pragmatics that extends both forward into the future and backward into the past: “By following the law, the power flows from the land to the people through the Chief; by using the wealth of the territory, the House feasts its Chief so he can properly fulfill the law. This cycle has been repeated on my land for thousands of years. The histories of my House are always being added to.”<sup>275</sup> Further illustrating the cultural pragmatics of the potlatch complex, Delgam Uukw continues,

My presence in this courtroom today will add to my House’s power, as it adds to the power of the other Gitksan and Wet’suwet’en Chiefs who will appear here or who will witness the proceedings. All of our roles, including yours, will be remembered in the histories that will be told by my grandchildren. Through the witnessing of all the histories, century after century, we have exercised our jurisdiction.<sup>276</sup>

Thus, while the potlatch complex, as Suttles alluded to earlier, may not be exactly the same as it was prior to contact, it has continued unfolding through changing situations and various conflicts up to the present, enfolding Euro-Canadian goods and an increasing variety of people along the way.

As a result, the potlatch complex is a central institution to the ways of life of coastal British Columbian First Nations that has the ability to also enfold the shared sovereignty and convergence that s. 35(1) demands. Perhaps, on the coast, one way this convergence could occur is by the Crown (or, maybe, the judiciary) hosting a feast or potlatch themselves. As I suggested elsewhere, such a potlatch or feast could occur “as part of the culmination of the protocols” provided through the potlatch complex in which the Court and the Crown could be enfolded into

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<sup>275</sup> Gisday Wa & Delgam Uukw, *supra* note 267 at 8.

<sup>276</sup> *Ibid.*

as the lives of Aboriginal peoples, and the processes and protocols of the potlatch complex unfold.<sup>277</sup>

If, as Delgam Uukw stated before the BCSC, law, people and the land become one in the feast hall why, based on my proposed trans-systemic framework, cannot the common law be a part? While the common law is anchored to a distant land,<sup>278</sup> since 1982 our constitution is now rooted in Canadian soil. The Court and the Crown need to acknowledge this and (re)place the common law back in the world and in a relational “way of life.” Moreover, by converging the potlatch complex and the common law, if and when a particular coastal British Columbian First Nation peoples are ready to do so, this will also meet the Court’s expressed wishes that Aboriginal rights claims be negotiated instead of litigated.<sup>279</sup> Hopefully in this thesis I have opened up a way of approaching Aboriginal rights that cuts the Gordian knot that ties Aboriginal rights to non-Aboriginal foundations,<sup>280</sup> and provided the new language that Borrows called for.<sup>281</sup>

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<sup>277</sup> Ebert, “Feasting”, *supra* note 255 at 33.

<sup>278</sup> Henderson, *First Nations Jurisprudence*, *supra* note 4 at 189-90, *Treaty Rights*, *supra* note 189 at 118 ff.

<sup>279</sup> See e.g. *Haida Nation*, *supra* note 29 at para 14: “While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests.” Again, see Ebert, “Feasting”, *supra* note 255 for a more in-depth discussion of the implications of this potlatch complex–common law convergence.

<sup>280</sup> See e.g. Borrows, *Indigenous Constitution*, *supra* note 62 at 260.

<sup>281</sup> *Ibid* at 118.

# Bibliography

## LEGISLATION

*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

*The Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

*Fishery Regulations for the Province of British Columbia*, s 1, Order-in-Council, 26 November 1888, *Canada Gazette*, vol 22.

## JURISPRUDENCE

*Ahousaht Indian Band v Canada (AG)*, [2010] 1 CNLR 1 (BCSC).

*Baker Lake (Hamlet of) v Minister of Indian and Northern Development*, [1980] 1 FC 518.

*Calder v Attorney-General of British Columbia*, [1973] SCR 313.

*Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791.

*Delgamuukw v British Columbia*, [1991] 5 CNLR 1 (BCSC).

*Delgamuukw v The Queen*, [1993] 5 WWR 97 (BCCA).

*Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

*Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

*Hunter v Southam Inc*, [1984] 2 SCR 145.

*Jack & Charlie v The Queen*, [1985] 2 SCR 332.

*Lax Kw'alaams Indian Band v Canada (AG)*, [2008] 3 CNLR 158 (BCSC).

*Lax Kw'alaams Indian Band v Canada (AG)*, [2010] 1 CNLR 278 (BCCA).

*Lax Kw'alaams Indian Band v Canada (AG)*, [2011] 4 CNLR 346 (SCC).

*Mitchell v MNR*, [2001] 1 SCR 911.

*R v Adams*, [1996] 3 SCR 101.

*R v Côté*, [1996] 3 SCR 139.

*R v Gladstone*, [1996] 2 SCR 723.

*R v Gladue*, [1999] 1 SCR 688.

*R v He-ma-sak*, Library and Archives, Department of Indian Affairs, RG 10, vol 3628, file 6244-1 (1889).

*R v Horseman*, [1990] 1 SCR 901.

*R v Kapp*, [2003] 4 CNLR 238 (BC Prov Ct).

*R v Kapp*, [2008] 2 SCR 483.

*R v Marshall*, [1999] 3 SCR 456.

*R v Marshall*, [1999] 3 SCR 533.  
*R v Marshall; R v Bernard*, [2005] 2 SCR 220.  
*R v NTC Smokehouse*, [1996] 2 SCR 672.  
*R v Pamajewon*, [1996] 2 SCR 821.  
*R v Powley*, [2003] 2 SCR 207.  
*R v Sappier; R v Gray*, [2006] 2 SCR 686.  
*R v Sioui*, [1990] 1 SCR 1025.  
*R v Sparrow*, [1990] 1 SCR 1075.  
*R v Vanderpeet*, [1991] 3 CNLR 155 (BC Prov Ct).  
*R v Vanderpeet*, [1993] 5 WWR 459 (BCCA).  
*R v Van der Peet*, [1996] 2 SCR 507.  
*Re Southern Rhodesia*, [1919] AC 211 (PC).  
*Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519.  
*Tsilhqot'in Nation v British Columbia*, [2008] 1 CNLR 112 (BCSC).

## SECONDARY MATERIALS: MONOGRAPHS

Adams, John. *The Gitksan Potlatch: Population Flux, Resource Ownership and Reciprocity* (Toronto: Holt, Rinehart & Winston of Canada, 1973).  
 Alexander, Jeffrey C, Bernard Giesen & Jason L Mast, eds. *Social Performance: Symbolic Action, Cultural Pragmatics, and Ritual* (Cambridge: Cambridge University Press, 2006).  
 Barrett, Paul H & RB Freeman, eds. *The Works of Charles Darwin*, vol 16, *The Origin of Species*, 1876 (New York: New York University Press, 1988).  
 Bateson, Gregory. *Steps to an Ecology of Mind* (Chicago: University of Chicago Press, 2000).  
 ———. *Mind and Nature: A Necessary Unity* (Cresskill, NJ: Hampton Press, 2002).  
 Berman, Harold. *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983).  
 Beynon, William. *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks*, ed by Margaret Anderson & Marjorie Halpin (Vancouver: UBC Press, 2000).  
 Bierwert, Crisca, ed. *Lushootseed Texts: An Introduction to Puget Salish Narrative Aesthetics* (Lincoln: University of Nebraska Press, 1996).  
 Blaut, JM. *The Colonizer's Model of the World: Geographical Diffusion and Eurocentric History* (New York & London: The Guilford Press, 1993).  
 ———. *Eight Eurocentric Historians* (New York & London: The Guilford Press, 2000).  
 Boas, Franz. *The Social Organization and the Secret Societies of the Kwakiutl Indians*, Report of the US National Museum for 1895 (Washington: Government Printing Office, 1897).  
 Borrows, John. *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).



- Bourgois, Philippe. *In Search of Respect: Selling Crack in El Barrio* (Cambridge: Cambridge University Press, 1996).
- Boxberger, Daniel L. *To Fish In Common: The Ethnohistory of Lummi Indian Salmon Fishing* (Seattle: University of Washington Press, 2000).
- Brock, Peggy. *The Many Voyages of Arthur Wellington Clah: A Tsimshian Man on the Pacific Northwest Coast* (Vancouver: UBC Press, 2011).
- Brody, Hugh. *The Other Side of Eden: Hunter-Gathers, Farmers and the Shaping of the World* (London: Faber and Faber, 2001).
- Canada. *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Minister of Supply & Services Canada, 1996).
- Carlson, Keith Thor. *The Power of Place, The Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism* (Toronto: University of Toronto Press, 2010).
- Carter, Paul. *The Road to Botany Bay: An Exploration of Landscape and History* (Chicago: University of Chicago Press, 1987).
- Chomsky, Noam. *Language and Mind*, 3d ed (Cambridge: Cambridge University Press, 2006).
- Cobb, John N. *The Canning of Fishery Products: Showing the History of the Art of Canning; the Methods Followed With Each Species, and Suggestions for Canning Unutilized Species; Where, When and How They Are Obtained; Together With Other Information of Much Value to Cannors* (Seattle: Miller Freeman, 1919).
- Codere, Helen. *Fighting with Property: A Study of Kwakiutl Potlatching and Warfare, 1792-1930*, Monographs of the American Ethnological Society 18 (New York: JJ Augustin, 1950).
- Cole, Douglas & Ira Chaikin. *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990).
- Coté, Charlotte. *Spirits of our Whaling Ancestors: Revitalizing Makah & Nuuchah-nulth Traditions* (Seattle: University of Washington Press 2010).
- Culhane, Dara. *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talonbooks, 1998).
- Daly, Richard. *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005).
- Descartes, René. *Principles of Philosophy*, translated, with explanatory notes, by Valentine Rodger Miller & Reese P Miller (Dordrecht, Holland: D Reidel Publishing Company, 1983).
- . *The Philosophical Writings of Descartes*, translated by John Cottingham et al (Cambridge: Cambridge University Press, 1991) vol 3.
- . *Meditations on First Philosophy, With Selections from the Objections and Replies*, revised ed & translated by John Cottingham (Cambridge: Cambridge University Press, 1996).
- Fitzpatrick, Peter. *The Mythology of Modern Law* (London: Routledge, 1992).
- Furtwangler, Albert. *Bringing Indians to the Book* (Seattle: University of Washington Press, 2005).

- Geertz, Clifford. *The Interpretation of Cultures* (New York: Basic Books, 1973).
- . *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).
- Gisday Wa & Delgam Uukw. *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987* (Gabriola, BC: Reflections, 1989).
- Good, Byron J. *Medicine, rationality, and experience: an anthropological perspective* (Cambridge: Cambridge University Press, 1994).
- Harmon, Alexandra. *Indians in the Making: Ethnic Relations and Indian Identities around Puget Sound* (Berkeley: University of California Press, 1998).
- Harris, Douglas C. *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001).
- . *Landing Native Fisheries: Indian Reserves & Fishing Rights in British Columbia, 1849-1925* (Vancouver: UBC Press, 2008).
- Haseler, Stephen. *The Super-Rich: The Unjust New World of Global Capitalism* (New York: Palgrave Macmillan, 2000).
- Henderson, James Youngblood. *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006).
- Henderson, James (Sa'ke'j) Youngblood. *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007).
- Hobbes, Thomas. *Leviathan* (New York: Penguin Books, 1968).
- Husserl, Edmund. *Logical Investigations*, translated by JN Findlay (London: Routledge and Keegan Paul, 1970).
- Ingold, Tim. *The Perception of the Environment: Essays in livelihood, dwelling and skill* (London: Routledge, 2000).
- . *Lines: A Brief History* (New York: Routledge, 2007).
- . *Being Alive: Essays on Movement, Knowledge and Description* (New York: Routledge, 2011).
- King, JCH. *First Peoples, First Contacts: Native Peoples of North America* (London: British Museum Press, 1999).
- Kuhn, Thomas S. *The Structure of Scientific Revolutions*, 3d ed (Chicago: University of Chicago Press, 1996).
- Kuper, Adam. *The Reinvention of Primitive Society: Transformations of a myth* (London: Routledge, 2005).
- Latour, Bruno. *We Have Never Been Modern* (Cambridge MA: Harvard University Press, 1993).
- Leach, Edmund. *Social Anthropology* (Oxford: Oxford University Press, 1982).
- Lévi-Strauss, Claude. *The Savage Mind* (Chicago: University of Chicago Press, 1966).
- Lutz, John Sutton. *Makúk: A New History of Aboriginal-White Relations* (Vancouver: UBC Press, 2008).

- Mackie, Richard Somerset. *Trading Beyond the Mountains: The British Fur Trade on the Pacific, 1793-1843* (Vancouver: UBC Press, 1997).
- Malinowski, Bronislaw. *A Scientific Theory of Culture and other essays* (Chapel Hill: University of North Carolina Press, 1944).
- Marx, Karl & Friedrich Engels. *The German Ideology: Parts I & III*, ed by R Pascal (New York: International Publishers, 1947).
- Mauss, Marcel. *The Gift: The Form and Reason for Exchange in Archaic Societies* (London: Routledge, 2001).
- Mills, Antonia. *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994).
- Mills, P Dawn. *For Future Generations: Reconciling Gitx̱san and Canadian Law* (Saskatoon, SK: Purich Publishing, 2008).
- Moore, Jerry. *Visions of Culture: An Introduction to Anthropological Theories and Theorists*, 2d ed (New York: Altamira Press, 2004).
- Morgan, Lewis Henry. *Ancient Society* (Chicago: Charles H Kerr & Company, 1877).
- Narotzky, Susana. *New Directions in Economic Anthropology* (Chicago: Pluto Press, 1997).
- The New Encyclopædia Britannica*, 15th ed, *sub verbo* “pizza”.
- Newell, Dianne. *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993).
- Pearce, Roy Harvey. *Savagism and Civilization: A Study of the Indian and the American Mind* (Baltimore: Johns Hopkins Press, 1967).
- Pearse, Peter H. *Turning the Tide: A New Policy for Canada's Pacific Fisheries*, The Commission on Pacific Fisheries Policy Final Report (Vancouver: Minister of Supply and Services, Canada, 1982).
- . *Managing Salmon in the Fraser: Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation* (Vancouver: Department of Fisheries and Oceans, 1992).
- Peoples, James & Garrick Bailey. *Humanity: An Introduction to Cultural Anthropology*, 7th ed (Belmont CA: Thomson Higher Education, 2006).
- Phillips, Kevin P. *Wealth and Democracy: A Political History of the American Rich* (New York: Broadway Books, 2003).
- Rapport, Nigel & Joanna Overing. *Social and Cultural Anthropology: The Key Concepts*, 2d ed (London: Routledge, 2007).
- Rosen, Lawrence. *Law as Culture: An Invitation* (Princeton NJ: Princeton University Press, 2006).
- Rosman, Abraham & Paula G Rubel. *Feasting with Mine Enemy: Rank and Exchange among Northwest Coast Societies* (New York: Columbia University Press, 1971).
- Ross, Alexander. *Adventures of the first settlers on the Oregon or Columbia River: being a narrative of the expedition fitted out by John Jacob Astor to establish the “Pacific Fur*

- Company;*” with an account of some Indian tribes on the coast of the Pacific (London: Smith, Elder and Co, 1849).
- Roth, Christopher F. *Becoming Tsimshian: The Social Life of Names* (Seattle: University of Washington Press, 2008).
- Sahlins, Marshall. *Stone Age Economics* (Chicago: Aldine-Atherton, 1972).
- Sahlins, Marshall D & Elman R Service. *Evolution and Culture* (Ann Arbor: University of Michigan Press, 1960).
- Sharma, Parnesh. *Aboriginal Fishing Rights: Laws, Courts, Politics* (Halifax NS: Fernwood Publishing, 1998).
- Smith, Marian W. *The Puyallup-Nisqually* (New York: Columbia University Press, 1940).
- Stacey, Duncan A. *Sockeye & Tinplate: Technological Change in the Fraser River Canning Industry, 1871-1912*, Heritage Record No 15 (Victoria: British Columbia Provincial Museum, 1982).
- Sterritt, Neil J et al. *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998).
- Steward, Julian H. *Area Research: Theory and Practice*, Social Science Research Council Bulletin 63 (New York: Social Science Research Council, 1950).
- . *Theory of Culture Change: the methodology of multilineal evolution* (Chicago: University of Illinois Press, 1955).
- Tambiah, Stanley J. *Magic, science, religion, and the scope of rationality* (Cambridge: Cambridge University Press, 1990).
- Traweek, Sharon. *Beamtimes & Lifetimes: The World of High Energy Physicists* (Cambridge, MA: Harvard University Press, 1988).
- Tuchman, Gaye. *Making News: A Study in the Construction of Reality* (New York: The Free Press, 1978).
- Turnbull, David. *Masons, Tricksters and Cartographers: Comparative Studies in the Sociology of Scientific and Indigenous Knowledge* (London: Routledge, 2000).
- Tylor, Sir Edward B. *Primitive Culture: Researches Into the Development of Mythology, Philosophy, Religion, Art & Custom* (London: John Murray, 1871).
- Unger, Roberto M. *Democracy Realized: The Progressive Alternative* (London: Verso, 1998).
- White, Richard. *Land Use, Environment, and Social Change: The Shaping of Island County, Washington* (Seattle: University of Washington Press, 1999).
- Williams, Raymond. *Keywords: A Vocabulary of Culture and Society*, revised ed (New York: Oxford University Press, 1983).
- Wilson, Edward O. *Sociobiology: The New Synthesis* (Cambridge, MA: Harvard University Press, 1975).
- Wolf, Daniel R. *The Rebels: A Brotherhood of Outlaw Bikers* (Toronto: University of Toronto Press, 1991).

Wolf, Eric R. *Europe and the People Without History* (Berkeley: University of California Press, 1982).

## SECONDARY MATERIALS: ARTICLES

Alexander, Jeffrey C. "Cultural Pragmatics: Social Performance Between Ritual and Strategy" (2004) 22 *Sociological Theory* 527.

Anderson, Margaret & Marjorie Halpin. "Introduction" in Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000) 3.

Anghie, Antony. "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40 *Harv Int'l LJ* 1.

Asch, Michael. "Errors in *Delgamuukw*: An Anthropological Perspective" in Frank Cassidy, ed, *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books & The Institute for Research on Public Policy, 1992) 221.

———. "The Judicial Conceptualization of Culture After *Delgamuukw* and *Van der Peet*" (2000) 5 *Rev Const Stud* 119.

———. "*Calder* and the Representation of Indigenous Society in Canadian Jurisprudence" in Hamar Foster, Heather Raven and Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the *Calder* Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 101.

Asch, Michael & Catherine Bell. "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of *Delgamuukw*" (1994) 19 *Queen's LJ* 503.

Barnard, Alan. "Culture: the Indigenous Account" in Deborah James, Evie Plaice & Christina Toren, eds, *Culture Wars: Context, Models and Anthropologists' Accounts* (New York: Berghahn Books, 2010) 73.

Barnett, Homer G. "The Nature of the Potlatch" (1938) 40:3 *American Anthropologist* 349.

Barsh, Russel Lawrence. "Backfire From Boldt: The Judicial Transformation of Coast Salish Proprietary Fisheries into a Commons" (1991) 4 *Western Legal History: The Journal of the Ninth Judicial Circuit Historical Society* 85.

Barsh, Russel Lawrence & James Youngblood Henderson. "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 *McGill LJ* 993.

Benforado, Adam & Jon Hanson. "The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy" (2008) 57 *Emory LJ* 311.

———. "Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights" (2008) 57 *Emory LJ* 1087.

———. "Naïve Cynicism: Maintaining False Perceptions in Policy Debates" (2008) 57 *Emory LJ* 499.

Berger, Benjamin L. "Law's Religion: Rendering Culture" (2007) 45 *Osgoode Hall LJ* 277.

Berger, Thomas. "The Charter: A Historical Perspective" (1989) 23 *UBC L Rev* 603.

- Binder, Guyora. "Critical Legal Studies" in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory*, 2d ed (Chichester, UK: Wiley-Blackwell, 2010) 267.
- Bjerkli, Bjørn. "Land Use, Traditionalism and Rights" (1996) 13 *Acta Borealia* 3.
- Blackman, Margaret B. "Creativity in Acculturation: Art, Architecture and Ceremony from the Northwest Coast" (1976) 23:4 *Ethnohistory* 387.
- Borrows, John. "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *Am Indian L Rev* 37.
- . "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 *UTLJ* 417.
- . "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 *Const Forum Const* 27.
- Bouquet, Mary. "Exhibiting knowledge: The trees of Dubois, Haeckel, Jesse and Rivers at the *Pithecanthropus* centennial exhibition" in Marilyn Strathern, ed, *Shifting Contexts: Transformations in Anthropological Knowledge* (New York: Routledge, 1995) 31.
- . "Family Trees and Their Affinities: The Visual Imperative of the Genealogical Diagram" (1996) 2 *Journal of the Royal Anthropological Institute* 43.
- . "Reply to Parkin's Comment: Kinship with Trees" (1997) 3 *Journal of the Royal Anthropological Institute* 375.
- . "Genealogy in Anthropology" in Neil J Smelser & Paul B Baltes, eds, *International Encyclopedia of the Social & Behavioral Sciences* (New York: Elsevier, 2001) 6029.
- Bowker, Andrea. "*Sparrow's* Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995) 53 *UT Fac L Rev* 1.
- Brower, Robert W. "Pizza" in Andrew F Smith, ed, *The Oxford Encyclopedia of Food and Drink in America*, vol 2 (Oxford: Oxford University Press, 2004) 286.
- Carlson, Keith Thor. "Stó:lō Exchange Dynamics" (1996) 11:1 *Native Studies Review* 5.
- . "Prophesy" in Keith Thor Carlson, ed, *A Stó:lō Coast Salish Historical Atlas* (Vancouver: Douglas & McIntyre, 2001) 154.
- Carneiro, Robert L. "On the Relationship Between Size of Population and Complexity of Social Organization" (1967) 23 *Southwestern Journal of Anthropology* 234.
- Charlton, Guy. "Letting go of Culture: A Comment on *R. v. Sappier*; *R. v. Gray*" (2007-2008) 39 *Ottawa L Rev* 317.
- Chartrand, Larry. "Métis Aboriginal Title in Canada" in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon SK: Purich Publishing, 2004) 151.
- Chen, Ronald & Jon Hanson. "Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory" (2004) 77 *S Cal L Rev* 1103.
- Cheng, Chilwin Chienhan. "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997) 55 *UT Fac L Rev* 419.
- Christie, Gordon. "Law, Theory and Aboriginal Peoples" (2003) 2 *Indigenous LJ* 67.
- Cole, Douglas & David Darling. "History of the Early Period" in Wayne Suttles, ed, *Handbook of North American Indians*, vol 7 (Washington: Smithsonian Institution, 1990) 119.

- Connolly, Anthony. "Judicial Conceptions of Tradition in Canadian Aboriginal Rights Law" (2006) 7 *The Asia Pacific Journal of Anthropology* 27.
- Cranmer-Webster, Gloria. "From Colonization to Repatriation" in Gerald McMaster and Lee-Ann Martin, eds, *Indigena: Contemporary Native Perspectives* (Vancouver: Douglas & McIntyre, 1992) 25.
- Cruikshank, Julie. "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. B.C.*" (1992) 95 *BC Studies* 25.
- Culhane, Dara. "Adding Insult to Injury: Her Majesty's Loyal Anthropologist" (1992) 95 *BC Studies* 66.
- Daly, Richard & Antonia Mills. "Ethics and Objectivity: AAA Principles of Responsibility Discredit Testimony" (1993) 34:8 *Anthropology Newsletter* 1.
- Darnell, Regna. "The Pivotal Role of the Northwest Coast in the History of Americanist Anthropology" (2000) 125/126 *BC Studies* 33.
- Descola, Philippe. "Constructing natures: symbolic ecology and social practice" in Philippe Descola & Gísli Pálsson, eds, *Nature and Society: Anthropological Perspectives* (London: Routledge, 1996) 82.
- Deur, Douglas. "The Hunt for Identity: On the Contested Targets of Makah Whaling" in Jim Norwine & Jonathan M Smith, eds, *Worldview Flux: Perplexed Values among Postmodern Peoples* (New York: Lexington Books, 2000) 145.
- Deur, Douglas & Nancy J Turner. "Introduction: Reconstructing Indigenous Resource Management, Reconstructing the History of an Idea" in Douglas Deur & Nancy J Turner, eds, *Keeping it Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Vancouver: UBC Press, 2005) 3.
- Donald, Leland. "The Northwest Coast as a Study Area: Natural, Prehistoric, and Ethnographic Issues" in RG Matson, Gary Coupland & Quentin Mackie, eds, *Emerging from the Mist: Studies in Northwest Coast Culture History* (Vancouver: UBC Press, 2003) 289.
- Drucker, Philip. "Culture Element Distributions XXVI: Northwest Coast" (1950) 9:3 *Anthropological Records* 157.
- Ebert, Mark. "Feasting Judicial Convergence: Reconciling Legal Perspectives through the Potlatch Complex" (2013) 18 *Appeal* 21.
- Eisenberg, Avigail. "Reasoning about Identity: Canada's Distinctive Culture Test" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 34.
- Goldenberg, André. "'Surely Uncontroversial': The Problems and Politics of Environmental Conservation as a Justification for the Infringement of Aboriginal Rights in Canada" (2002) 1 *JL & Equality* 278.
- . "'Salmon for Peanut Butter': Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights" (2004) 3 *Indigenous LJ* 61.
- Goldsmith, Michael. "Marshall Sahlins (1930–)" in Robert Gordon, Andrew P Lyons & Harriet D Lyons, eds, *Fifty Key Anthropologists* (London: Routledge, 2011) 209.

- Gooch, Pernille. "Being-in-the-world: The Phenomenology of Indigeness" in Alf Hornborg & Mikael Kukiala, eds, *Voices of the Land: Identity and Ecology in the Margins* (Lund: Lund University Press, 1998) 289.
- Goodenough, Ward. "Cultural Anthropology and Linguistics" in Paul L Garvin, ed, *Report of the Seventh Annual Round Table Meeting on Linguistics and Language Study, University of Georgetown Monograph Series on Languages and Linguistics, No 9* (Washington: Georgetown University Press, 1957) 167.
- Gordon, Deborah. "Tenacious Assumptions in Western Medicine" in Margaret Lock & Deborah Gordon, eds, *Biomedicine Examined* (London: Kluwer Academic Publishers, 1988) 19.
- Gover, Brian J & Mary Locke Macaulay. "'Snow Houses Leave No Ruins': Unique Evidence Issues in Aboriginal and Treaty Rights Cases" (1996) 60 Sask L Rev 47.
- Gowdy, John. "Hunter-gatherers and the mythology of the market" in Richard B Lee & Richard Daly, eds, *The Cambridge Encyclopedia of Hunters and Gatherers* (Cambridge: Cambridge University Press, 1999) 391.
- Groenewegen, PD. "A Note on the Origin of the Phrase, 'Supply and Demand'" (1973) 83 The Economic Journal 505.
- Hallowell, A Irving. "Ojibwa Ontology, Behavior, and World View" in Stanley Diamond, ed, *Culture in History: Essays in Honor of Paul Radin* (New York: Columbia University Press, 1960) 19.
- Handler, Richard. "Authenticity" (1986) 2:1 Anthropology Today 2.
- Hanson, Jon & Kathleen Hanson. "The Blame Frame: Justifying (Racial) Injustice in America" (2006) 41 Harv CR-CLL Rev 413.
- Hanson, Jon & David Yosifon. "The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture" (2003) 152 U Pa L Rev 129.
- . "The Situational Character: A Critical Realist Perspective on the Human Animal" (2004) 93 Geo LJ 1.
- Harkin, Michael. "Potlatch in Anthropology" in Neil J Smelser & Paul B Baltes, eds, *International Encyclopedia of the Social & Behavioral Sciences* (New York: Elsevier, 2001) 11885.
- Harmon, Alexandra. "Lines In Sand: Shifting Boundaries Between Indians and Non-Indians In the Puget Sound Region" (1995) 26 Western Historical Quarterly 429.
- Harris, Douglas C & Peter Millerd. "Food Fish, Commercial Fish, and Fish to Support a Moderate Livelihood: Characterizing Aboriginal and Treaty Rights to Canadian Fisheries" (2010) 1 Arctic Review on Law & Politics 82.
- Heidegger, Martin. "Building Dwelling Thinking" in David Farrell Krell, ed, *Basic Writings: from Being and Time (1927) to The Task of Thinking (1964)* (New York: HarperCollins, 1993) 347.
- Henderson, James (Sákéj) Youngblood. "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241.



- . “The Context of the State of Nature” in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 11.
- . “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon SK: Purich Publishing, 2004) 67.
- . “Dialogical Governance: A Mechanism of Constitutional Governance” (2009) 72 Sask L Rev 29.
- Henderson, James (Sákéj) Youngblood & Jaime Battiste. “How Aboriginal Philosophy Informs Aboriginal Rights” in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford: Oxford University Press, 2013) 66.
- Holmes, Oliver Wendell. “Law in Science and Science in Law” (1899) 12 Harvard L Rev 443.
- Howell, Signe. “Nature in culture or culture in nature?: Chewong ideas of ‘humans’ and other species” in Philippe Descola & Gísli Pálsson, eds, *Nature and Society: Anthropological Perspectives* (London: Routledge, 1996) 127.
- Ingold, Tim. “Becoming Persons: Consciousness and Sociality in Human Evolution” (1991) 4:3 Cultural Dynamics 355.
- . “Editorial” (1992) 27 Man 693.
- . “The Art of Translation in a Continuous World” in Gísli Pálsson, ed, *Beyond Boundaries: Understanding, Translation, and Anthropological Discourse* (Oxford: Berg, 1993) 210.
- . “Against the Motion (1): Human worlds are culturally constructed” in Tim Ingold, ed, *Key Debates in Anthropology* (London: Routledge, 1996) 112.
- . “The Evolution of Society” in AC Fabian, ed, *Evolution: Society, Science and the Universe* (Cambridge: Cambridge University Press, 1998) 79.
- . “From complementarity to obviation: on dissolving the boundaries between social and biological anthropology, archaeology and psychology” (1998) 123 Zeitschrift für Ethnologie 21.
- . “Introduction to Culture” in Tim Ingold, ed, *Companion Encyclopedia of Anthropology* (New York: Routledge, 1998) 329.
- . “Comment: Human nature and science” (1999) 24 Interdisciplinary Science Reviews 250.
- . “Foreword” in Marcia-Anne Dobres & Christopher R Hoffman, eds, *The Social Dynamics of Technology: Practice, Politics, and World Views* (Washington: Smithsonian Institution Press, 1999) vii.
- . “Making Culture and Weaving the World” in PM Graves-Brown, ed, *Matter, Materiality and Modern Culture* (London: Routledge, 2000) 50.
- . “From the Transmission of Representations to the Education of Attention” in Harvey Whitehouse, ed, *The Debated Mind: Evolutionary Psychology versus Ethnography* (New York: Berg, 2001) 113.
- . “Three in one: How an ecological approach can obviate the distinctions between body, mind and culture” in Andreas Roepstorff, Nils Bubandt & Kalevi Kull, eds, *Imagining Nature: Practices of Cosmology and Identity* (Aarhus: Aarhus University Press, 2003) 40.
- . “Beyond biology and culture: The meaning of evolution in a relational world” (2004) 12:2 Social Anthropology 209.
- . “Two Reflections on Ecological Knowledge” in Glauco Sanga & Gherardo Ortalli, eds, *Nature Knowledge: Ethnoscience, Cognition, and Utility* (New York: Berghahn Books, 2004) 301.

- . “Epilogue: Towards a Politics of Dwelling” (2005) 3:2 *Conservation & Society* 501.
- . “Walking the Plank: Meditations on a Process of Skill” in John R Dakers, ed, *Defining Technological Literacy: Towards an Epistemological Framework* (New York: Palgrave Macmillan, 2006) 65.
- . “Bindings against Boundaries: Entanglements of Life in an Open World” (2008) 40 *Environment & Planning A* 1796.
- . “The Man in the Machine and the Self-Builder” (2010) 35 *Interdisciplinary Science Reviews* 353.
- Ingold, Tim & Terhi Kurttila. “Perceiving the Environment in Finnish Lapland” (2000) 6 *Body & Society* 183.
- Jonaitis, Aldona. “Northwest Coast Totem Poles” in Ruth B Phillips & Christopher B Steiner, eds, *Unpacking Culture: Art and Commodity in Colonial and Postcolonial Worlds* (Berkeley: University of California Press, 1999) 104.
- Keesing, Roger M. “Theories of Culture Revisited” in Robert Borofsky, ed, *Assessing Cultural Anthropology* (New York: McGraw-Hill, 1994) 301.
- Kennedy, Duncan. “The Stages of the Decline of the Public/Private Distinction” (1982) 130 *U Pa L Rev* 1349.
- Kroeber, AL. “Preface” in Stanislaus Klimek, “Culture Element Distributions I: The Structure of California Indian Culture” (1935) 37:1 *University of California Publications in American Archaeology and Ethnology* 1.
- Lave, Jean. “The culture of acquisition and the practice of understanding” in James W Stigler, Richard A Shweder & Gilbert Herdt, eds, *Cultural Psychology: Essays on Comparative Human Development* (Cambridge: Cambridge University Press, 1990) 309.
- Leiter, Brian. “American Legal Realism” in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory*, 2d ed (Chichester, UK: Wiley-Blackwell, 2010) 249.
- Macdonald, Gaynor. “Does ‘culture’ have ‘history’?: Thinking about continuity and change in central New South Wales” (2001) 25 *Aboriginal History* 176.
- MacIntosh, Constance. “Developments in Aboriginal Law: The 2006-2007 Term” (2007) 38 *Sup Ct L Rev* (2d) 1.
- . “From Judging Culture to Taxing ‘Indians’: Tracing the Legal Discourse of the “Indian Mode of Life”” (2009) 47 *Osgoode Hall LJ* 399.
- Malinowski, Bronislaw. “The Group and the Individual in Functional Analysis” (1939) 44 *American Journal of Sociology* 938.
- Marchak, Patricia. “Uncommon Property” in Patricia Marchak, Neil Guppy & John McMullan, eds, *Uncommon Property: The Fishing and Fish-Processing Industries in British Columbia* (Toronto: Methuen, 1987) 3.
- McCaslin, Wanda. “Saskatchewan holds court in Cree” (2001) 6:4 *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice* 6.
- McEvoy, John P. “Aboriginal Activities and Aboriginal Rights: A Comment on *R. v. Sappier; R. v. Gray*” (2007) 6:2 *Indigenous LJ* 1.

- Miller, Bruce G. "Culture as Cultural Defense: An American Indian Sacred Site in Court" (1998) 22 *American Indian Quarterly* 83.
- Miller, Bruce G, ed. "Special Issue: Anthropology and History in the Courts" (1992) 95 *BC Studies*.
- Miller, Jay. "The Shell(Fish) Game: Rhetoric, Images, and (Dis)Illusions in Federal Court" (1999) 23:4 *American Indian Culture & Research Journal* 159.
- Miller, Jay with Warren Snyder. "Suquamish Traditions" (1999) 33:1 *Northwest Anthropological Research Notes* 105.
- Mosby, Ian. "Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942-1952" (2013) 46:91 *Histoire sociale/Social History* 145.
- Muszynski, Alicja. "Major Processors to 1940 and Early Labour Force: Historical Notes" in Patricia Marchak, Neil Guppy & John McMullan, eds, *Uncommon Property: The Fishing and Fish-Processing Industries in British Columbia* (Toronto: Methuen, 1987) 46.
- Nadasdy, Paul. "Transcending the Debate over the Ecologically Noble Indian: Indigenous Peoples and Environmentalism" (2005) 52 *Ethnohistory* 291.
- Newell, Dianne. "Dispersal and concentration: the slowly changing spatial pattern of the British Columbia salmon canning industry" (1988) 14 *Journal of Historical Geography* 22.
- Newman, Dwight G. "You Still Know Nothin' 'Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights" (2007) 52 *McGill LJ* 725.
- Niezen, Ronald. "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18:2 *CJLS* 1.
- Overstall, Richard. "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22.
- Pálsson, Gísli. "The virtual aquarium: Commodity fiction and cod fishing" (1998) 24 *Ecological Economics* 275.
- Perry, Adele. "The Colonial Archive on Trial: Possession, Dispossession, and History in *Delgamuukw V. British Columbia*" in Antoinette Burton, ed, *Archive Stories: Facts, Fictions, and the Writing of History* (Durham, NC: Duke University Press, 2005) 325.
- Piddocke, Stuart. "The Potlatch System of the Southern Kwakiutl: A New Perspective" (1965) 21:3 *Southwest Journal of Anthropology* 244.
- Pinkerton, Evelyn. "Indians in the Fishing Industry" in Patricia Marchak, Neil Guppy & John McMullan, eds, *Uncommon Property: The Fishing and Fish-Processing Industries in British Columbia* (Toronto: Methuen, 1987) 249.
- Pinkoski, Marc. "Julian Steward, American Anthropology, and Colonialism" (2008) 4 *Histories of Anthropology Annual* 172.
- Pinkoski, Marc & Michael Asch. "Anthropology and Indigenous Rights in Canada and the United States: Implications in Steward's Theoretical Project" in Alan Barnard, ed, *Hunter-Gatherers in History, Archaeology and Anthropology* (Oxford: Berg, 2004) 187.

- Quinn, Naomi & Dorothy Holland. "Culture and cognition" in Dorothy Holland & Naomi Quinn, eds, *Cultural models in language and thought* (Cambridge: Cambridge University Press, 1987) 3.
- Ralston, Keith. "Patterns of Trade and Investment on the Pacific Coast, 1867-1892: The Case of the British Columbia Salmon Canning Industry" (1968-69) 1 BC Studies 37.
- Rivers, WHR. "A Genealogical Method of Collecting Social and Vital Statistics" (1900) 30 Journal of the Anthropological Institute of Great Britain and Ireland 74.
- . "The Genealogical Method of Anthropological Inquiry" (1910) 3:1 The Sociological Review 1.
- Ronaasen, Sheree, Richard O Clemmer & Mary Elizabeth Rudden. "Rethinking Cultural Ecology, Multilinear Evolution, and Expert Witnesses: Julian Steward and the Indian Claims Commission Proceedings" in Richard O Clemmer, L Daniel Myers & Mary Elizabeth Rudden, eds, *Julian Steward and the Great Basin: The Making of an Anthropologist* (Salt Lake City: University of Utah Press, 1999) 170.
- Sepez, Jennifer. "Treaty Rights and the Right to Culture: Native American Subsistence Issues in US Law" (2002) 14 Cultural Dynamics 143.
- Sepez Aradanas, Jennifer & Ann Tweedie. "Makah Harpoons vs. Media Hype: Cultural Stereotypes, Academic Research, and Public Policy" (1999) Fall Oregon Humanities 48.
- Shweder, Richard A. "Divergent Rationalities" in Donald W Fiske & Richard A Shweder, eds, *Metatheory in Social Science: Pluralisms and Subjectivities* (Chicago: University of Chicago Press, 1986) 163.
- Slattery, Brian. "The Legal Basis of Aboriginal Title" in Frank Cassidy, ed, *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, BC: Oolichan Books & The Institute for Research on Public Policy, 1992) 113.
- Sm'ooygit Hannamauxw. "Preface" in Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000) ix.
- Smith, Andrew F. "Tomatoes" in Andrew F Smith, ed, *The Oxford Encyclopedia of Food and Drink in America*, vol 2 (Oxford: Oxford University Press, 2004) 545.
- Smith, Bruce D. "Low-Level Food Production and the Northwest Coast" in Douglas Deur & Nancy J Turner, eds, *Keeping it Living: Traditions of Plant Use and Cultivation on the Northwest Coast of North America* (Vancouver: UBC Press, 2005) 37.
- Sterritt, NJ. "Unflinching Resistance to an Implacable Invader" in Boyce Richardson, ed, *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) 267.
- Steward, Julian H. "Evolution and Process" in AL Kroeber, ed, *Anthropology Today* (Chicago: University of Chicago Press, 1953) 313.
- . "Ecology: Cultural Ecology" in David L Sills, ed, *International Encyclopedia of the Social Sciences*, vol 4 (New York: The Macmillan Company, The Free Press, 1968) 337.
- Stocking, Jr, George W. "The Ethnographer's Magic: Fieldwork in British Anthropology from Tylor to Malinowski" in George W Stocking, Jr, ed, *Observers Observed: Essays on Ethnographic Fieldwork, History of Anthropology*, vol 1 (Madison: University of Wisconsin Press, 1983) 70.

- Suttles, Wayne. "Post-Contact Culture Change Among The Lummi Indians" (1954) 18 *British Columbia Historical Quarterly* 29.
- . "Introduction" in Wayne Suttles, ed, *Handbook of North American Indians*, vol 7 (Washington: Smithsonian Institution, 1990) 1.
- . "Streams of Property, Armor of Wealth: The Traditional Kwakiutl Potlatch" in Aldona Jonaitis, ed, *Chiefly Feasts: The Enduring Kwakiutl Potlatch* (New York: American Museum of Natural History, 1991) 71.
- Tushnet, Mark. "Critical Legal Studies: An Introduction to its Origins and Underpinnings" (1986) 36 *J Legal Educ* 505.
- . "Survey Article: Critical Legal Theory (without Modifiers) in the United States" (2005) 13 *Journal of Political Philosophy* 99.
- Vallance, Neil. "The Misuse of 'Culture' by the Supreme Court of Canada" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 97.
- Vergunst, Jo Lee. "Taking a Trip & Taking Care in Everyday Life" in Tim Ingold & Jo Lee Vergunst, eds, *Ways of Walking: Ethnography & Practice on Foot* (Aldershot, England: Ashgate, 2008) 105.
- Vincent, Joan. "Genealogical method" in Alan Barnard & Jonathan Spencer, eds, *Encyclopedia of Social and Cultural Anthropology* (London: Routledge, 1996) 262.
- Walters, Mark. "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 *Queen's LJ* 350.
- White, Leslie. "Energy and the Evolution of Culture" (1943) 45 *American Anthropologist* 335.
- Whiteley, Peter. "Do 'Language Rights' Serve Indigenous Interests?: Some Hopi and Other Queries" (2003) 105 *American Anthropologist* 712.
- Williamson, Barbara. "The Pizza Syndrome" (1989) 1:3 *Project North BC Newsletter* 1.
- Wolf, Eric R. "Inventing society" (1988) 15 *American Ethnologist* 752.
- Woodburn, James. "Egalitarian Societies" (1982) 17 *Man* 431.

## OTHER MATERIALS

- Attorney General of Nova Scotia. Intervener factum for *R v Sappier; R v Gray*, [2006] 2 SCR 686.
- Ebert, Mark. *To A Different Canoe: A Study of Cultural Pragmatics and Continuity* (PhD Thesis, University of Aberdeen, 2006) [unpublished].
- . "The Resonance of Material Culture: Carving and Weaving the Past" (Paper delivered at the 60th Annual Northwest Anthropological Conference, Washington State University, 15 March 2007), [unpublished].
- Legat, Allice. *Walking the Land, Feeding the Fire: Becoming and Being Knowledgeable Among the Tâîchô Dene* (PhD Thesis, University of Aberdeen, 2007) [unpublished].

- Lincoln, Leslie J. *Paddle to Seattle: A Native Washington Movement to “Bring Them Canoes Back Home”* (MA Thesis, University of British Columbia, 1990) [unpublished].
- Nelson, Willie. “Nobody Said It Was Going to Be Easy,” by Willie Nelson and Mickey Raphael, on *Music from Songwriter*, Columbia Records.
- New Brunswick Forest Products Association. Intervener factum for *R v Sappier; R v Gray*, [2006] 2 SCR 686.
- Nuu-chah-nulth Tribal Council, online: Nuuchahnulth Tribal Council, Welcome <<http://www.nuuchahnulth.org/tribal-council/welcome.html>>.
- Okanagan Nation Alliance & Shuswap Nation Tribal Council. Intervener factum for *R v Sappier; R v Gray*, [2006] 2 SCR 686.
- Seguin Anderson, Margaret. *The Allied Tribes Tsimshian of North Coastal British Columbia: Social Organization, Economy and Trade* (Expert witness report submitted for *Lax Kw’alaams Indian Band v Canada (AG)*, 2006).
- Tollefson, Kenneth D. *The Cultural Foundation of Political Revitalization Among the Tlingit* (PhD Thesis, University of Washington, 1976) [unpublished].
- United Nations Declaration on the Rights of Indigenous Peoples, 2007, Doc A/61/L 67.
- Vallance, Neil. *The Use of the Term “Culture” By the Supreme Court of Canada: A Comparison of Aboriginal and Non-Aboriginal Cases Since 1982* (MA Thesis, University of Victoria, 2003) [unpublished].